

**Commissioner Kate Jenkins**  
Sex Discrimination Commissioner  
Australian Human Rights Commission  
GPO Box 5218  
Sydney NSW 2001

**21 February 2019**

Dear Commissioner Jenkins,

*Re: National Inquiry into Sexual Harassment in Australian Workplaces*

Thank you for the opportunity to make a submission to the Australian Human Rights Commission's inquiry into workplace sexual harassment. My submission addresses the current legal framework with respect to sexual harassment. It focuses on two aspects of that framework: the problems with the federal system for addressing sexual harassment and workplace discrimination; and two problems with the individual complaints-based model, namely confidentiality and the reliance on the employee to enforce the law.

My submission is based on the doctrinal and comparative research I have conducted on sexual harassment and anti-discrimination laws over the past fourteen years. I have also drawn on interviews I have recently conducted with 19 solicitors practising in anti-discrimination law (including sexual harassment) in Victoria. The solicitors represent both complainants and respondents.<sup>1</sup> While the focus of that research was the effectiveness of the *Equal Opportunity Act 2010* (Vic), as these solicitors have experience litigating in the state and federal anti-discrimination jurisdictions and in the federal industrial relations jurisdiction, their comments are relevant to your inquiry.<sup>2</sup>

## **1. Federal Sexual Harassment and Sex Discrimination Claims**

### *1.1 Jurisdictional Choices and their Consequences*

Employees who are sexually harassed have the option of lodging a claim under federal or state and territory anti-discrimination laws. If the claim is about sex discrimination, they could also lodge it under the *Fair Work Act 2009* (Cth) ('FWA') but that Act does not prohibit sexual harassment. The current legal framework is complex due to the intersecting and overlapping legal regimes. A woman who has been sexually harassed and experienced discrimination at work could bring both claims under the *Sex Discrimination Act 1984* (Cth) ('SDA') or her local anti-discrimination law. She could bring the sex discrimination claim under s 351 of the FWA but would have to use either the SDA or her local anti-discrimination law for the sexual harassment discrimination claim, which adds to the cost and complexity of the process for her and for her employer. Choice of jurisdiction is made more complex for employees who do not have legal representation or obtain it too late. Consequently, they might lodge their claim in the wrong jurisdiction or one that is not the 'best' for their claim or they may miss a filing deadline (particularly under s 366 of the FWA where the time limit is 21 days if the claim involves a dismissal).

The solicitors I interviewed expressed a strong preference for using the Fair Work system, including those who represent respondents. The solicitors were very positive about the dispute resolution process the Fair Work Commission uses. They said the system's strengths are that conciliations were organised quickly, run by experts in employment matters, and the sessions were focused on reaching an outcome. The other benefit of the Fair Work system is that it is a no-costs jurisdiction.

The complainant solicitors I interviewed in Victoria were reluctant to use the federal anti-discrimination laws. The primary reasons they do not use the federal laws are the time it takes to resolve a claim and the risk of costs. Some solicitors said that they can wait months before a date for a conciliation session that suits both parties is arranged. It must also be a date on which the AHRC staff can travel to Melbourne, and that usually means waiting until there are multiple conciliations for them to conduct. This reflects the resource constraints placed on the Commission and its geographic location in Sydney

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<sup>1</sup> The research is being funded by the Victorian Legal Services Board and was approved by the Department of Justice (Victoria) Human Research Ethics Committee (project number: CF/16/23372) and the Monash University Human Ethics Committee (project number: 8648).

<sup>2</sup> The quotes are de-identified and codes are used in the material below. I have noted whether the solicitor primarily represents complainant or respondents where relevant.

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but it is a significant factor when lawyers decide which jurisdiction to use, and is diverting claims away from the federal anti-discrimination jurisdiction to the states and territories, at least in Victoria, thus reducing the impact of federal law.

The second reason complainant solicitors advise clients not to use the federal system is the risk of an adverse costs order if they lose in court. As many pointed out, it will still cost clients to run their claim in Victoria in the tribunal (particularly if they need to brief a barrister) but there is not the risk of an adverse costs order if they lose. There is not the same costs risk if a FWA claim proceeds to the Federal Courts but, as noted above, this avenue is not always open and does not apply to sexual harassment claims.

### 1.2 Recommendations

- Provide the AHRC with additional resources so that it can provide conciliations earlier in the process before the parties are entrenched and so that its conciliators can travel more frequently to other parts of the country to conduct conciliation sessions;
- Prohibit sexual harassment in the *Fair Work Act 2009* (Cth) and extend the time limit for lodging a claim from 21 days to 60 days when the claim involves a dismissal;
- Remove the costs risk from litigating in the Federal Court for claims lodged under the *Australian Human Rights Commission Act 1986* (Cth).

## 2. The Individual Complaints Based Model

The current legal framework for addressing sexual harassment relies on the individual victim to make a claim at the AHRC (or local equivalent agency) and attempt to resolve it. The vast majority of claims settle or are withdrawn. Very few reach a court hearing.<sup>3</sup> In this part of the submission, I address problems with two aspects of the individual complaints based model – the prevalence of confidentiality and the absence of a regulator.

### 2.1 Prevalence of Confidentiality

The process of making and resolving a complaint at the AHRC is confidential and the AHRC does not release much information about the nature of complaints or how they were settled. Some case studies are published in its annual report and online on the conciliation register but most of the information that is released is statistical data about claims and parties. This masks the extent to which sexual harassment remains an issue in society, the nature of the unlawful conduct and how claims are being resolved. For instance, are employers agreeing to systemic remedies that would address ongoing issues in their workplaces or are they only agreeing to compensate the individual employee?

My related concern with confidentiality is that settlement agreements usually include a confidentiality clause. The solicitors I interviewed said that they regularly encounter confidentiality clauses. A complainant solicitor described confidentiality clauses as “not negotiable”.<sup>4</sup> Two respondent solicitors said that settlement agreements “almost always”<sup>5</sup> include confidentiality. A respondent solicitor described the confidentiality clause as one of them terms that “go without saying”. They went on to say: “I can’t remember the last time I’ve looked at a settlement agreement that didn’t have confidentiality in it and confidentiality around not just the settlement but often the complaint itself, the investigation if there was one, the negotiations.”<sup>6</sup>

It is important to recognise the breadth of these clauses. A respondent solicitor told me that they do not just cover the settlement terms, they often extend to the complaint itself, any internal investigation and the settlement negotiations.<sup>7</sup> Moreover, they may prevent the complainant from discussing the complainant with anyone else at all. Indeed, that was my experience some years ago when helping a friend navigate the process.<sup>8</sup>

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<sup>3</sup> See further Dominique Allen, ‘Behind the Conciliation Doors – Settling Discrimination Complaints in Victoria’ (2009) 18(3) *Griffith Law Review* 778-799; Dominique Allen, ‘Settling Sexual Harassment Complaints – What Benefits does ADR Offer?’ (2013) 24 *Australasian Dispute Resolution Journal* 169-177

<sup>4</sup> Participant 8021L.

<sup>5</sup> Participant 7011L; Participant 7024L.

<sup>6</sup> Participant 7024L.

<sup>7</sup> Participant 7024L.

<sup>8</sup> See Dominique Allen, ‘Dealing with Employment Discrimination’ (2010) 35(2) *Alternative Law Journal* 109-110.

## 2.2 Recommendations

- Provide the AHRC with the resources it needs to collect and publish de-identified data and case studies about the prevalence of sexual harassment and sex discrimination in the workplace;
- The AHRC should disseminate de-identified data about the remedies negotiated in settlement agreements to practitioners, academics and the community.

## 2.3 Individual Enforcement

The legal framework for addressing sexual harassment relies on the individual who has been sexually harassed for enforcement. There is no scope for the AHRC or another statutory agency to take independent action, unlike other regulators like the Fair Work Ombudsman, ASIC or the ACCC. Nor can the AHRC take the claim on the individual's behalf or assist them financially or otherwise if they take their claim to court.<sup>9</sup>

To address sexual harassment effectively, the burden should not be borne by the individual alone; it is necessary to invest a statutory agency, such as the AHRC, with the power to enforce the law. As one of the solicitors I interviewed put it, "In an arena like this where the individual has to do all the heavy lifting... systemic discrimination is not going to be addressed unless you have a body like the Commission or an equivalent of the Fair Work Ombudsman in the anti-discrimination sphere."<sup>10</sup> Giving the AHRC a role in enforcing the law would complement its current role in providing education and training about sexual harassment, conducting inquiries and intervening in relevant court proceedings.

Not only does the current model rely on the individual for enforcement, the courts regularly order individualised remedies (predominantly compensation) and individual remedies are usually negotiated when claims are settled. I examined the outcomes negotiated in sexual harassment claims in Queensland over a 12 month period and found that 75% of settlements negotiated at the conciliation stage included compensation and only 40% included training. Only 17% of respondents agreed to review their policies and practices. Systemic remedies were non-existent if the claim settled later through mediation conducted by the tribunal; all of those sexual harassment claims settled for compensation.<sup>11</sup>

If ongoing, systemic sexual harassment and sex discrimination are to be effectively addressed, the Federal Court needs the power to order systemic remedies such as equal opportunity training, workplace audits, and changes to the employer's policies and practices.

## 2.4 Recommendations

- Change the enforcement model for claims lodged under the *Australian Human Rights Commission Act 1986* (Cth) and give the AHRC the power to enforce breaches of federal sexual harassment and sex discrimination laws both by funding strategic litigation and taking claims in its own name. In deciding what claims to pursue, deterrence should be a factor, as should obtaining wider, systemic change;
- Amend s 46PO(4) of the *Australian Human Rights Commission Act 1986* (Cth) to enable the Federal Court and Federal Circuit Court to order systemic remedies.

I have attached four journal articles in which I explore many of these issues in more detail. I am happy to provide the inquiry with additional information should you require it.

Yours sincerely,

Dominique

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<sup>9</sup> Cf the USA and UK where this has been possible since the introduction of anti-discrimination laws. See further Dominique Allen, 'Barking and Biting – the Equal Opportunity Commission as an Enforcement Agency' (2016) 44(2) *Federal Law Review* 311-335; Dominique Allen, 'Strategic Enforcement of Anti-Discrimination Law: A New Role for Australia's Equality Commissions' (2010) 36(3) *Monash University Law Review* 103-137

<sup>10</sup> Participant 4081L.

<sup>11</sup> See further Dominique Allen, 'Settling Sexual Harassment Complaints – What Benefits does ADR Offer?' (2013) 24 *Australasian Dispute Resolution Journal* 169-177, 174-175.

**Attachments**

1. Dominique Allen, 'Barking and Biting – the Equal Opportunity Commission as an Enforcement Agency' (2016) 44(2) *Federal Law Review* 311-335
2. Dominique Allen, 'Settling Sexual Harassment Complaints – What Benefits does ADR Offer?' (2013) 24 *Australasian Dispute Resolution Journal* 169-177
3. Dominique Allen, 'Strategic Enforcement of Anti-Discrimination Law: A New Role for Australia's Equality Commissions' (2010) 36(3) *Monash University Law Review* 103-137
4. Dominique Allen, 'Wielding the Big Stick – Lessons for Enforcing Anti-Discrimination Law from the Fair Work Ombudsman' (2015) 21(1) *Australian Journal of Human Rights* 119-142

# **BARKING AND BITING: THE EQUAL OPPORTUNITY COMMISSION AS AN ENFORCEMENT AGENCY**

*Dominique Allen\**

## **ABSTRACT**

Federal anti-discrimination law centres upon the individual who has experienced unlawful discrimination. To address this discrimination, the individual is required to lodge a complaint at the Australian Human Rights Commission ('AHRC'), which will attempt to resolve the complaint using Alternative Dispute Resolution ('ADR'). While institutions in other areas, like competition law and occupational health and safety, have a broad range of powers to enforce compliance, successive governments have chosen not to invest the AHRC with equivalent powers. Quite a different model has operated in Britain for four decades. This article analyses the role of the AHRC by comparing it to its British equivalents and examining these institutions according to the 'enforcement pyramid' for regulating equal opportunity, which British academics Bob Hepple, Mary Coussey and Tufyal Choudhury have developed. According to these regulatory theorists, to tackle discrimination effectively, equality commissions need to be able to follow up their loud 'bark' with a punitive 'bite' if necessary. The article concludes by identifying what the experience in both countries reveals about the enforcement of anti-discrimination laws by statutory institutions.

## **I INTRODUCTION**

Federal anti-discrimination law centres upon the individual who has experienced unlawful discrimination. To address this discrimination, the individual is required to lodge a complaint at the Australian Human Rights Commission, which will attempt to resolve the complaint using Alternative Dispute Resolution.<sup>1</sup> The AHRC is a gatekeeper

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\* Senior Lecturer, Deakin Law School, Deakin University. Earlier versions of this article were presented at the Global Challenges and New Perspectives on Equality Law conference at the Université libre de Bruxelles and at a seminar hosted by the Centre for Employment and Labour Relations Law, University of Melbourne. I am grateful to attendees at both for their feedback. Much of this article was completed while I was a visitor at the Faculty of Laws, University College London. My thinking about enforcement was aided by conversations with Colm O'Connell, John Wadham, and Sandra Fredman and her PhD students. I am also very grateful to the late Sir Bob Hepple for discussing his regulatory pyramid with me and

in that it must process a discrimination complaint before the complaint can be heard by the Federal Court or the Federal Circuit Court.<sup>2</sup> The bulk of the AHRC's work comprises complaint handling and educating the community about the law; the AHRC is not able to enforce the law.

A 2013 case brought by the then Disability Discrimination Commissioner, Graeme Innes, in a private capacity illustrates the inadequacies of the current model of enforcing anti-discrimination law. Innes won a disability discrimination case against RailCorp NSW after the Commissioner, who is blind, experienced repeated instances of RailCorp NSW failing to provide audible station announcements on Sydney trains.<sup>3</sup> Innes tried to resolve the matter informally by meeting with the respondent and lodging complaints at the AHRC. When he was unable to resolve the matter, Innes lodged a complaint as a private individual, supported by the Public Interest Advocacy Centre, at the risk of substantial cost to himself.<sup>4</sup> Although it had the power to order RailCorp NSW to change its practices,<sup>5</sup> the Federal Magistrates Court only awarded Innes compensation, potentially leaving the unlawful practices in place; thus if announcements are not made again, another person will have to lodge another discrimination claim.<sup>6</sup> If the AHRC had been able to take enforcement action, the case may not have been litigated. The AHRC could have conducted its own investigation into the matter and sought enforceable undertakings from RailCorp NSW, whereby the latter would agree to systemic changes such as audible stop announcements and discrimination training in lieu of further action. Failing that, the AHRC could have issued a compliance notice with an action plan to achieve the same outcome or it could have sought the imposition of a sanction, such as a civil penalty, if the respondent failed to comply. This approach would have addressed the systemic problem earlier and without the need for legal action. However, unlike other federal agencies, like the Australian Competition and Consumer Commission and the Fair Work Ombudsman, the AHRC cannot undertake enforcement work; that burden is borne by the individual.

This article analyses the role of the AHRC by comparing it to its British equivalents and by applying to these institutions the enforcement pyramid for regulating equal opportunity that British academics Bob Hepple, Mary Coussey and Tufyal Choudhury

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reflecting upon the evolving role of equality commissions, and to Shae McCrystal for her help with the final version of this article. Any errors are my own.

<sup>1</sup> *Australian Human Rights Commission Act 1986* (Cth) s 46P ('AHRC Act'). A parallel scheme operates in the states and territories. Complaints about discrimination in the workplace may also constitute a breach of s 351 of the *Fair Work Act 2009* (Cth) ('FWA') but it is not possible to lodge a complaint about the same conduct under both the FWA and the anti-discrimination regimes: FWA ss 725, 732, 734.

<sup>2</sup> *AHRC Act* s 46PO.

<sup>3</sup> *Innes v Rail Corporation (NSW) [No 2]* (2013) 273 FLR 66.

<sup>4</sup> Jacob Saulwick, 'Disability Case Costs RailCorp \$420 000', *The Sydney Morning Herald* (Sydney), 29 March 2013.

<sup>5</sup> *AHRC Act* s 46PO(4)(a).

<sup>6</sup> Following the decision, Sydney Trains, which is now responsible for the service, said it would improve audible announcements and train its frontline staff: Public Interest Advocacy Centre, 'Sydney Trains to Improve Announcements' (Media Release, 14 August 2013).

developed.<sup>7</sup> The article then identifies what this analysis reveals about the enforcement of anti-discrimination laws by a statutory institution. The article is structured as follows. Part II outlines Hepple, Coussey and Choudhury's enforcement pyramid. The pyramid is based on the ideas of regulatory theorist John Braithwaite, who argues that a regulator (in this instance, the equality commission) will be more effective in securing voluntary compliance by using persuasion when it is backed by punishment.<sup>8</sup> The regulator starts with voluntary measures and, if necessary, scales the pyramid, utilising measures that escalate in severity to achieve compliance. Part III examines the AHRC's powers relating to anti-discrimination law in the context of the enforcement pyramid.<sup>9</sup> Although this article focuses on the AHRC, its state and territory equivalents have very similar powers,<sup>10</sup> so the conclusions drawn are applicable across the country.

It is not unusual to have civil legislation prohibiting discrimination, enforced by the individual who has experienced discrimination along with a national statutory equality commission responsible for all prohibited forms of discrimination.<sup>11</sup> This model is used in Britain, Northern Ireland, Ireland, the United States of America, Canada and New Zealand. Part IV compares the Australian experience to Britain because the latter offers an example of a jurisdiction where the statutory commission can seek compliance with the law but is not responsible for complaint handling; the complainant has direct access to court. When the British government created the first modern equality commission (the Equal Opportunities Commission), it said it expected the body to play 'a major role in enforcing the law in the public interest'.<sup>12</sup> Thus the Commission was given appropriate powers to do so. Soon after, the responsibility for complaint handling was taken away from the British Race Relations Board (Britain's first equality commission) so that the Board could take a broader, strategic approach to addressing discrimination

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<sup>7</sup> Bob Hepple, Mary Coussey and Tufyal Choudhury, *Equality: A New Framework: Report of the Independent Review of the Enforcement of UK Anti-Discrimination Legislation* (Hart Publishing, 2000) ch 3.

<sup>8</sup> John Braithwaite, 'Rewards and Regulation' (2002) 29 *Journal of Law and Society* 12, 19.

<sup>9</sup> The AHRC also has powers in relation to human rights (see pt II div 3 of the *AHRC Act*). As this article is solely concerned with the enforcement of anti-discrimination laws, its human rights powers are not considered further.

<sup>10</sup> See further Neil Rees, Simon Rice and Dominique Allen, *Australian Anti-Discrimination Law* (Federation Press, 2<sup>nd</sup> ed, 2014) ch 12.

<sup>11</sup> The Australian statutory commissions have favoured the terms 'anti-discrimination' and 'equal opportunity' and are either a Commission, Authority or Board. The AHRC is the only exception. 'Equal opportunity' was removed from the AHRC's name when it was renamed in 2008. Britain has preferred the term 'equality', as have Northern Ireland and Ireland. For ease of reference, 'equality commission' is used throughout this article when referring to the agency in general terms. It may be argued that this is not the most accurate descriptor of the AHRC but since the premise of this article is that the AHRC's role in tackling discrimination and promoting equality would be strengthened if it could enforce the law, 'equality' was selected in preference to 'equal opportunity' commission.

<sup>12</sup> Home Office, *Equality for Women* (1974) 7 [29]. At 7 [28] the government identified the limitations of relying on individual complaints to address discrimination and noted the likelihood that a requirement that the equality commission investigate every discrimination complaint would lead to a backlog and distract the agency from its core work.

and without being constrained by complaint handling.<sup>13</sup> So although anti-discrimination laws in Britain operate similarly to Australia's, from the time the British equality commissions were established, they have played quite a different role to the AHRC. Part V offers some insights into what the experiences of Australia and Britain reveal about the nature of enforcing compliance with anti-discrimination law.<sup>14</sup>

Before discussing enforcement, it is necessary to define the parameters of this article and the usage of the term 'enforcement' in this context. First, although the equality commissions in Britain and Australia are responsible for human rights and, to varying degrees, their enforcement, their responsibilities for human rights are not considered herein. This discussion is solely concerned with anti-discrimination laws. Second, this article does not consider the substantive law in either jurisdiction; it only considers the role of the statutory equality commission. Third, the article is concerned with the enforcement of anti-discrimination laws in the sense of who has the power to seek compliance with the law. The law is enforced by the courts in both Australia and Britain, in that only a court can declare whether the law has been breached and impose a sanction. This article does not suggest any change to this. The article is concerned with who is able to seek a declaration that the law has been breached and to seek the imposition of a sanction. As discussed fully in Parts III and IV, in Australia the individual bears this responsibility, while in Britain both the individual and the equality commission do. For this reason, the equality commission will be described as an 'enforcement body' which has 'enforcement powers'. This language is used by other commentators and equality commissions.<sup>15</sup>

<sup>13</sup> The Race Relations Board was responsible for complaint handling but not able to enforce the law. The Board was replaced by the Commission for Racial Equality in 1977, which was modelled on the Equal Opportunities Commission. See further Bob Hepple, 'Agency Enforcement of Workplace Equality' in Linda Dickens (ed), *Making Employment Rights Effective: Issues of Enforcement and Compliance* (Hart Publishing, 2012) 49, 51; Bob Hepple, 'The Equality Commissions and the Future Commission for Equality and Human Rights' in Linda Dickens and Alan C Neal (eds), *The Changing Institutional Face of British Employment Relations* (Kluwer Law International, 2006) 101, 105–6.

<sup>14</sup> For comparative assessments, see Colm O'Conneide, 'Single Equality Bodies: Lessons from Abroad' (Working Paper No 4, Equal Opportunities Commission, 2002); Mary Coussey, 'Tackling Racial Equality: International Comparisons' (Research Study No 238, Home Office, April 2002); Jean R Sternlight, 'In Search of the Best Procedure for Enforcing Employment Discrimination Laws: A Comparative Analysis' (2004) 78 *Tulane Law Review* 1401; Julie Chihye Suk, 'Antidiscrimination Law in the Administrative State' [2006] *University of Illinois Law Review* 405; Colin Harvey and Sarah Spencer, 'Advancing Human Rights and Equality: Assessing the Role of Commissions in the United Kingdom and Ireland' (2012) 35 *Fordham International Law Journal* 1615.

<sup>15</sup> See, eg, Hepple, Coussey and Choudhury, above n 7; Sternlight, above n 14; Nick O'Brien, 'The GB Disability Rights Commission and Strategic Law Enforcement: Transcending the Common Law Mind' in Anna Lawson and Caroline Gooding (eds), *Disability Rights in Europe: From Theory to Practice* (Hart Publishing, 2005) 249; Equality and Human Rights Commission, *Compliance and Enforcement Policy* (January 2015) <<http://www.equalityhumanrights.com/legal-and-policy/commission/enforcement-powers>>; US Equal Employment Opportunity Commission, *US Equal Employment Opportunity Commission National Enforcement Plan* (1997) <<http://www.eeoc.gov/eeoc/plan/nep.cfm>>.



## II THE REGULATORY PYRAMID FOR ENFORCING ANTI-DISCRIMINATION LAWS

Economists argue that when it comes to regulating markets, ‘carrots’ are better than ‘sticks’, but Braithwaite argues that, in the context of regulating business, ‘punishments are more valuable than rewards for securing compliance’.<sup>16</sup> To be effective, persuasion must be backed by punishment. Overusing punishment can be ineffective; so can relying on persuasion. To help regulators determine when to use what approach, Ian Ayres and Braithwaite developed a regulatory pyramid.<sup>17</sup> Persuasion sits at the base of the pyramid. Sanctions progressively increase in severity and become more punitive as one ascends the pyramid.<sup>18</sup> Braithwaite writes that the pyramid ‘is an attempt to solve the puzzle of when to punish and when to persuade.’<sup>19</sup> Punishment is not wielded frequently. The threat that it might be is what encourages compliance, making persuasion more effective. On this Belinda Smith writes:

The least intrusive forms of intervention could be used effectively as the primary and usual regulatory tools, *so long as* the regulator had access to more serious sanctions (ie a big stick) to be held mostly in reserve for extreme cases of irrational actors.<sup>20</sup>

Using Braithwaite’s ideas, Hepple, Coussey and Choudhury developed an enforcement pyramid for regulating equal opportunity.<sup>21</sup> At the pyramid’s base is persuasion including education, training and monitoring. At the next level is developing a voluntary action plan to promote ‘best practice’. This escalates to equality commission investigation. If the organisation does not comply with the commission’s investigation or it is unwilling to give suitable undertakings, the equality commission can issue a compliance notice. This directs the organisation to refrain from taking certain actions or making changes to ensure compliance, such as preparing an action plan. The organisation can appeal the issue of this notice. At the upper levels are judicial enforcement and then sanctions. Withdrawal of government contracts or licences sits at the pyramid’s apex. Hepple writes:

The role of the ... [equality commission] is to inform and persuade, and where necessary enforce the law. This involves education and monitoring and the stimulation of voluntary action by organisations, investigation if there is a belief that discrimination is occurring, and then enforcement by compliance notice, judicial process and sanctions.<sup>22</sup>

The structure is pyramid-shaped because the proportion of space at each layer of the pyramid represents the proportion of enforcement activity at that level. That is, persuasion, at the base, occupies the most space and revocation of licence, at the pyramid’s apex, occupies the least.<sup>23</sup> It follows that regulators should start by

<sup>16</sup> Braithwaite, ‘Rewards and Regulation’, above n 8, 13.

<sup>17</sup> Ian Ayres and John Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (Oxford University Press, 1992) figure 2.1.

<sup>18</sup> *Ibid*, figure 2.2.

<sup>19</sup> Braithwaite, ‘Rewards and Regulation’, above n 8, 20.

<sup>20</sup> Belinda Smith, ‘Not the Baby and the Bathwater: Regulatory Reform for Equality Laws to Address Work–Family Conflict’ (2006) 28 *Sydney Law Review* 689, 706 (emphasis in original).

<sup>21</sup> Hepple, Coussey and Choudhury, above n 7, ch 3. See especially: at 58 [3.6], 59 (figure 3.1).

<sup>22</sup> Bob Hepple, *Equality: The Legal Framework* (Hart Publishing, 2<sup>nd</sup> ed, 2014) 225.

<sup>23</sup> Ayres and Braithwaite, above n 17, 35.

attempting to use the voluntary measures at the base of the pyramid and only employ upper-level measures if this fails.

Hepple, Coussey and Choudhury's pyramid involves three interlocking mechanisms which, they write, 'create[s] a triangular relationship between those regulated, those whose interests are affected, and the Commission [agency] as the guardian of the public interest'.<sup>24</sup> They describe these mechanisms as follows:

The first is internal scrutiny by the institution itself to ensure effective self-regulation. The second is the role of interest groups which those regulated are required to inform, consult, and engage in the process of change. The third is the Commission, which provides the back-up role of assistance and ultimately enforcement where voluntary methods fail.<sup>25</sup>

As will be shown in Parts III and IV, the approach in neither Australia nor Britain conforms entirely to this model. Australia relies heavily on voluntary compliance and, although the British equality commissions have stronger enforcement powers, they have found these difficult to use.

### III THE AUSTRALIAN APPROACH: USING CARROTS TO ACHIEVE COMPLIANCE

#### A Resolving a Discrimination Complaint

Federal anti-discrimination law prohibits discrimination based on race, sex, disability and age in both employment and non-employment.<sup>26</sup> A person who has experienced discrimination can lodge a complaint at the AHRC. Provided the complaint has substance and is within the AHRC's jurisdiction, the AHRC will attempt to resolve it using ADR.<sup>27</sup> The vast majority of discrimination complaints are settled confidentially or withdrawn.<sup>28</sup> The AHRC is a gatekeeper in that it must handle the complaint before the federal courts can hear the complaint.<sup>29</sup>

However, very few complaints reach a hearing.<sup>30</sup> The reasons for this include the

<sup>24</sup> Hepple, Coussey and Choudhury, above n 7, 58.

<sup>25</sup> Ibid.

<sup>26</sup> *Racial Discrimination Act 1975 (Cth)*; *Sex Discrimination Act 1984 (Cth)* ('SDA'); *Disability Discrimination Act 1992 (Cth)*; *Age Discrimination Act 2004 (Cth)* ('ADA'). See further Rees, Rice and Allen, above n 10, chs 6, 7. The enforcement provisions are contained in the *AHRC Act*.

<sup>27</sup> *AHRC Act* pt IIB div 1.

<sup>28</sup> Dominique Allen, 'Behind the Conciliation Doors: Settling Discrimination Complaints in Victoria' (2009) 18 *Griffith Law Review* 778, 780. In the 2012–13 financial year, the AHRC received 2177 complaints. Forty-five per cent of the complaints were conciliated, 13% were withdrawn and 9% were discontinued: AHRC, *Annual Report 2012–2013*, 129–30 (tables 6, 10).

<sup>29</sup> *AHRC Act* s 46PH(1)(i).

<sup>30</sup> Allen, 'Behind the Conciliation Doors', above n 28, 780. Fifty human rights matters were filed in the Federal Court in 2012–13. This includes all attributes, as well as judicial review cases: email from the Federal Court Registry to the author, 28 July 2014. It referred 39 human rights matters to mediation and 13 were resolved: Federal Court of Australia, *Annual Report 2012–2013*, 35, 38 (tables 3.6, 3.12). One hundred and five human rights matters were filed in the Federal Circuit Court over the same period but it is not known how those matters were resolved: Federal Circuit Court of Australia, *Annual Report 2012–2013*, 46 (table 3.4).

difficulties of proving discrimination,<sup>31</sup> the technical way superior courts have interpreted the substantive law,<sup>32</sup> the likelihood of a low compensation award or of obtaining costs,<sup>33</sup> the risk of an adverse costs order if the complainant loses,<sup>34</sup> the stress of a trial and the desire to resolve the matter.<sup>35</sup> The decision to settle can be a commercial decision for respondents.<sup>36</sup> If a discrimination claim is successful, the court has the power to make a range of orders,<sup>37</sup> but it usually awards compensation in small amounts.<sup>38</sup> For example, between April 2000 and October 2011, the median amount of compensation awarded in successful *Racial Discrimination Act 1975* (Cth) claims was only \$9750.<sup>39</sup>

The AHRC cannot assist the individual complainant,<sup>40</sup> provide them with legal advice or take a claim on their behalf or in its own name. The AHRC's primary responsibilities are to receive complaints and provide ADR services.<sup>41</sup> Rather aptly, the AHRC's role has been described as 'to stand in the middle, like the grown-up in the playground, trying to get everyone to make up and play nice.'<sup>42</sup> The reliance on ADR is due in part to the fact that the AHRC, like its state and territory equivalents, was formed at a time when the prevailing view was that informal dispute resolution was the best way to deal with these disputes, rather than traditional adversarial methods.<sup>43</sup> This article does not suggest doing away with ADR. Informal dispute resolution is very valuable in this area of law, where complainants are often from disadvantaged or marginalised backgrounds. It is also beneficial for those who do not want to pursue what

<sup>31</sup> Jonathon Hunyor, 'Skin-Deep: Proof and Inferences of Racial Discrimination in Employment' (2003) 25 *Sydney Law Review* 535; Dominique Allen, 'Reducing the Burden of Proving Discrimination in Australia' (2009) 31 *Sydney Law Review* 579.

<sup>32</sup> Beth Gaze, 'Anti-Discrimination Laws in Australia' in Paula Gerber and Melissa Castan (eds), *Contemporary Perspectives on Human Rights Law in Australia* (Lawbook, 2013) 155, 168-70.

<sup>33</sup> Allen, 'Behind the Conciliation Doors', above n 28, 786-7.

<sup>34</sup> Gaze, above n 32, 175.

<sup>35</sup> Allen, 'Behind the Conciliation Doors', above n 28, 786.

<sup>36</sup> Ibid.

<sup>37</sup> *AHRC Act* s 46PO(4).

<sup>38</sup> Dominique Allen, 'Remedying Discrimination: the Limits of the Law and the Need for a Systemic Approach' (2010) 29 *University of Tasmania Law Review* 83, 92.

<sup>39</sup> See the data provided in AHRC, *Federal Discrimination Law* (21 October 2011) AustLII, ch 7.2.2 <<http://www.austlii.edu.au/au/other/HRLRes/2011/1/>>. See also *ibid* 90, 96 (figures 1, 3).

<sup>40</sup> The AHRC can only assist a complainant with preparing the court forms to commence proceedings in the Federal Court: *AHRC Act* s 46PT.

<sup>41</sup> The AHRC's other responsibilities are discussed below. It can also appear in court as an *amicus curiae*: *AHRC Act* s 46PV. Since 1988 it has intervened in 77 matters (as at 7 May 2015). Since 2001 its Commissioners have appeared as an *amicus curiae* in 23 matters (as at 14 March 2013): AHRC, *Submission to Court as Intervener and Amicus Curiae* <<https://www.humanrights.gov.au/our-work/legal/submissions/submission-court-intervener-and-amicus-curiae>>.

<sup>42</sup> Tim Elliott, 'Meet Gillian Triggs, the Woman Taking On Immigration Minister Scott Morrison', *The Sydney Morning Herald* (online), 1 August 2014 <<http://www.smh.com.au/federal-politics/political-news/meet-gillian-triggs-the-woman-taking-on-immigration-minister-scott-morrison-20140801-3cy82.html>>.

<sup>43</sup> Anna Chapman, 'Discrimination Complaint-Handling in NSW: The Paradox of Informal Dispute Resolution' (2000) 22 *Sydney Law Review* 321, 321-2.

can be expensive and time consuming legal action.<sup>44</sup> However, relying heavily on addressing discrimination through a confidential dispute resolution procedure, along with an agency that can only encourage voluntary compliance, is inadequate.

At the same time as Australia created the AHRC, Britain had experimented with this model and concluded that it was also necessary for the equality commission to be able to enforce the law, as discussed in Part IV. The premise of this article is that it is possible to improve upon the existing model used in Australia by giving the AHRC the ability to take enforcement action, leaving the provision of ADR to another institution.

Even though a variety of enforcement models were operating overseas when the AHRC was established and more have been introduced since, successive Australian governments have not revisited the AHRC's role.<sup>45</sup> One reason governments seem hesitant to invest the AHRC with stronger powers is to preserve its neutrality. In its review of the *Disability Discrimination Act 1992* (Cth) the Productivity Commission said that the potential conflict of interest that would arise if the AHRC played the role of neutral conciliator of complaints and regulator was a reason not to give it the power to initiate complaints or commence legal action.<sup>46</sup> The other factor that may explain the government's reluctance to change the existing model is a constitutional one. In 1986, the Human Rights and Equal Opportunity Commission ('HREOC') (as the AHRC was then known) was given the power to hear complaints about unlawful discrimination and make a non-binding determination about the contravention and the appropriate remedies.<sup>47</sup> If the respondent did not comply with this determination, it was necessary to commence proceedings in the Federal Court, which would re-hear the matter. In 1992,

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<sup>44</sup> See further Allen, 'Behind the Conciliation Doors', above n 27.

<sup>45</sup> The Brennan Committee's inquiry into a federal human rights Act received submissions which recommended changing the AHRC's functions: National Human Rights Consultation, *Report* (2009) [14.13]. The Human Rights and Anti-Discrimination Bill 2012 (Cth) did not propose to change the AHRC's role. It did propose introducing compliance mechanisms, including giving the AHRC the power to review an organisation's policies and procedures and to develop compliance codes for industry which would limit liability if a claim was made but these mechanisms would have been voluntary: at pt 3-1. The Senate Standing Committee on Legal and Constitutional Affairs' 2008 inquiry into the effectiveness of the *SDA* did not recommend changes to the enforcement model, only to the AHRC's ability to intervene in proceedings and the Commissioners' ability to appear as an amicus curiae, though it did recommend that further consideration be given to the AHRC's ability to commence action in the Federal Court for a breach of the *SDA* and to promulgate standards, and to the Sex Discrimination Commissioner's ability to conduct own motion investigations: Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Effectiveness of the Sex Discrimination Act 1984 in Eliminating Discrimination and Promoting Gender Equality* (2008) xvi-xviii (recommendations 30-2, 37-9). To date these recommendations have not been implemented. Cf pts 9 and 10 of the *Equal Opportunity Act 2010* (Vic) as originally enacted which introduced a much stronger enforcement model but this was repealed before the Act came into force: *Equal Opportunity Amendment Act 2011* (Vic) pt 2.

<sup>46</sup> Productivity Commission, *Review of the Disability Discrimination Act 1992*, Report No 30 (2004) 382-4. Similar concerns were expressed by the Senate Standing Committee on Legal and Constitutional Affairs: above n 45, 160.

<sup>47</sup> *Human Rights and Equal Opportunity Commission (Transitional Provisions and Consequential Amendments) Act 1986* (Cth).

this process was amended so that HREOC's determinations could be enforced like an order of the Federal Court.<sup>48</sup> This process was successfully challenged in *Brandy v Human Rights and Equal Opportunity Commission*<sup>49</sup> on the basis that the process vested judicial power in the HREOC, which was not a court established under Chapter III of the *Australian Constitution*.

The argument that will be pursued in this article is that discrimination will be addressed more effectively in Australia if an enforcement institution is created. It is suggested that the AHRC be divested of its complaint handling and ADR responsibilities so that it can focus on enforcement activities. 'Enforcement' is used in this context to mean compliance with the law, namely the non-discrimination principle, not the enforcement of a court judgment. This model is already operating in the industrial relations field in Australia. The *Fair Work Act 2009* (Cth) includes a prohibition of discrimination in the workplace.<sup>50</sup> The Fair Work Ombudsman ('FWO') is responsible for enforcing the Act in the federal courts. Dispute resolution is provided by a separate agency, the Fair Work Commission. As well as providing advice and education for employees and employers on their rights and responsibilities under the Act, the FWO has taken action against employers who have breached the Act.<sup>51</sup> The FWO does not exercise judicial power; that is retained by the federal courts. This is the model that is suggested for anti-discrimination law. The *Brandy* decision did not prevent it in the industrial relations field, so it follows that the AHRC could assume a role in enforcing federal anti-discrimination law (once its dispute resolution function is removed) that is shaped around the FWO's role and that this would be constitutionally valid.

## **B The Enforcement Pyramid Applied to Australia**

Having outlined how anti-discrimination law is currently enforced in Australia, the AHRC's powers relating to anti-discrimination law can now be examined in the context of Hepple, Coussey and Choudhury's enforcement pyramid. The powers located at each level of the pyramid are considered in turn.

### *1 Level 1: Persuasion, Information and Disclosure*

The AHRC is responsible for educating the community about their rights and obligations and providing information about the law,<sup>52</sup> which it does through its website, an advice line, holding training sessions and conducting advertising awareness campaigns. One of the AHRC's functions is to prepare guidelines about how to comply

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<sup>48</sup> *Sex Discrimination and Other Legislation Amendment Act 1992* (Cth).

<sup>49</sup> (1995) 183 CLR 245 ('*Brandy*').

<sup>50</sup> FWA s 351.

<sup>51</sup> See, eg, *Fair Work Ombudsman v Tiger Telco Pty Ltd (in liq)* [2012] FCA 479 (9 May 2012); *Fair Work Ombudsman v WKO Pty Ltd* [2012] FCA 1129 (17 October 2012); *Fair Work Ombudsman v Wongtas Pty Ltd [No 2]* [2012] FCA 30 (2 February 2012). It has also reached enforceable undertakings with non-compliant employers in lieu of further litigation: see Fair Work Ombudsman, *Enforceable Undertakings* <<http://www.fairwork.gov.au/About-us/Our-role/enforcing-the-legislation/enforceable-undertakings>>.

<sup>52</sup> AHRC Act s 31(d).

with the law.<sup>53</sup> The guidelines are not enforceable. Essentially, they are another form of information developed by the agency; they are often detailed.<sup>54</sup>

## 2 Level 2: Voluntary Action Plans

The AHRC can receive action plans developed by a person or organisation that is prohibited from discriminating under pt 2 of the *Disability Discrimination Act 1992* (Cth) ('DDA').<sup>55</sup> The action plan must include provisions about devising policies and programs to achieve the DDA's objects and evaluating them, communicating these policies and programs to people within the organisation, reviewing practices to identify discriminatory practices, setting goals and targets to measure the success of the action plan, and appointing people within the organisation to implement the plan.<sup>56</sup> Section 60 of the DDA states that a person 'may prepare and implement an action plan' (emphasis added) but there is no requirement that they do so. It is also optional to submit an action plan to the AHRC. If one is submitted, the AHRC must make it available publicly.<sup>57</sup> To date, 695 action plans are available.<sup>58</sup> Action plans can be taken into account when a respondent relies on the defence of 'unjustifiable hardship'<sup>59</sup> but they do not create an enforceable right for someone who is affected by a contravention unless the non-compliance constitutes unlawful discrimination. Moreover, they have not been extended to other attributes.

## 3 Level 3: Commission Investigation

The AHRC Act uses the term 'inquiry' to refer to an investigation conducted by the AHRC. The AHRC can inquire into human rights breaches by Commonwealth agencies and into some forms of workplace discrimination that are not protected by federal anti-discrimination law.<sup>60</sup> These powers originate from Australia's ratification of various international Conventions<sup>61</sup> but the AHRC can only attempt to conciliate these disputes; it cannot refer them to court.<sup>62</sup> If it cannot be conciliated, the complaint will be declined or the AHRC President may find a breach and prepare a report and recommendations for the Attorney-General.<sup>63</sup> The report must be tabled in each House of Parliament.<sup>64</sup>

<sup>53</sup> Ibid s 31(h).

<sup>54</sup> See, eg, Australian Human Rights Commission, *Effectively Preventing and Responding to Sexual Harassment: A Code of Practice for Employers* (2008). In *Richardson v Oracle Corp Australia Pty Ltd*, Buchanan J considered whether the employer's sexual harassment policy complied with the AHRC's Code when determining whether the employer had taken all reasonable steps to prevent sexual harassment: (2013) 232 IR 31, 75–6 [159]–[164].

<sup>55</sup> DDA s 64.

<sup>56</sup> Ibid s 61.

<sup>57</sup> Ibid s 64.

<sup>58</sup> AHRC, *Register of Disability and Discrimination Act Action Plans* <<https://www.humanrights.gov.au/our-work/disability-rights/standards/action-plans/register-disability-discrimination-act-action>>.

<sup>59</sup> DDA s 11(1)(e).

<sup>60</sup> AHRC Act pt II div 3, pt II div 4.

<sup>61</sup> Ibid schs 1–4.

<sup>62</sup> Ibid ss 11(1)(f), 31(b).

<sup>63</sup> In the 2012–13 financial year, 310 complaints were received but no reports were issued: AHRC, *Annual Report 2012–2013*, above n 28, table 6, table 10.

<sup>64</sup> AHRC Act ss 29, 35, 46.

Hepple, Coussey and Choudhury's model requires that if the agency finds that an organisation is non-compliant, it can make further inquiries and seek undertakings. If the AHRC finds non-compliance, its only recourse is to issue a report.

#### 4 *Level 4 and beyond*

The AHRC does not possess any of the enforcement powers listed at the upper levels of the pyramid.

In Australia the shape of enforcement is flat and rectangular, rather than pyramidal. The Australian model relies on 'carrots' or rewards to achieve compliance (namely encouragement through providing education and information about how to comply) but this is not backed by the threat that a 'stick' will be used if a respondent does not comply. Hepple, Coussey and Choudhury write that a voluntary approach may influence the behaviour of some organisations but not those that are resistant to change for economic or social reasons.<sup>65</sup> No doubt some organisations will comply so they are seen as good corporate citizens or to attract the best employees,<sup>66</sup> but for others there is no motivation to do comply and little threat of any action being taken against them.

According to some regulatory theorists, to tackle discrimination effectively, equality commissions need to be able to follow up their loud 'bark' with a punitive 'bite' if necessary. It is therefore suggested that the Australian model is modified so that the AHRC has a range of upper level powers to use.<sup>67</sup> This would be a significant shift in how anti-discrimination law is currently enforced. It would mean changing the complaint resolution model so that the AHRC was not responsible for complaint handling *and* enforcement. Given the expertise that the AHRC has and its long history of encouraging voluntary compliance with the law, it is suggested that the AHRC adopt new upper level powers and be divested of complaint handling and dispute resolution functions. The latter could be assumed by a separate specialist agency, leaving the AHRC to enforce the law. As discussed more fully in Part IV, this is what occurs in Britain – the Advisory Conciliation and Arbitration Service is responsible for providing ADR in employment-related discrimination complaints and the equality commission is responsible for enforcement.

It is preferable to divide the complaint handling and enforcement functions between two agencies rather than within the AHRC for three reasons. The first is so that the AHRC is not consumed by its complaint handling responsibilities and does not find it lacks adequate resources to enforce the law.<sup>68</sup> The second is to remove the conflict of

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<sup>65</sup> Hepple, Coussey and Choudhury, above n 7, 57.

<sup>66</sup> For example, by joining the AHRC's 'Racism. It Stops With Me' campaign, employers who meet certain requirements for the representation of women in their workplace may be awarded an Employer of Choice for Gender Equality citation from the Workplace Gender Equality Agency which they can use to attract female candidates.

<sup>67</sup> Smith has also suggested changing the regulatory model so that the AHRC better reflects other regulators. She proposes arming it with stronger enforcement powers so that it can pursue a range of escalating orders against a non-compliant respondent: Smith, above n 20, 723–9.

<sup>68</sup> Cf the US Equal Employment Opportunity Commission which, like the AHRC, is required to process complaints before the complainant can proceed to court. Unlike the AHRC, it can also take enforcement action. However, throughout most of its existence, complaint handling has consumed most of its resources, leaving insufficient funds for enforcement: Michael Z

interest that would arise if the AHRC provided ADR *and* enforced the law.<sup>69</sup> The third is to remove any expectation that the AHRC is a neutral participant in the process; it would be recast as an enforcement agency, like the FWO.

## IV ENFORCEMENT IN BRITAIN: A MORE 'POINTED' APPROACH

### A Resolving a Discrimination Complaint

**Table 1: British Equality Commissions**

Equality Commission	Acronym	In Existence
Equal Opportunities Commission	EOC	1975 – Oct 2007
Commission for Racial Equality	CRE	1977 – Oct 2007
Disability Rights Commission	DRC	2000 – Oct 2007
Equality and Human Rights Commission	EHRC	Oct 2007 – current

The Equality and Human Rights Commission ('EHRC') is the equality commission for England, Scotland and Wales.<sup>70</sup> The EHRC does not handle discrimination complaints; it is an advocacy and enforcement body.<sup>71</sup> Conciliation is provided by a government agency, the Advisory Conciliation and Arbitration Service.<sup>72</sup> The EHRC is also responsible for educating the community about the law,<sup>73</sup> and it can provide complainants with legal representation and other forms of assistance to help them resolve their complaint.<sup>74</sup>

Green, 'Proposing a New Paradigm for EEOC Enforcement After 35 Years: Outsourcing Charge Processing by Mandatory Mediation' (2001) 105 *Dickinson Law Review* 305, 309-10. The British government recently removed the EHRC's power to provide conciliation services in non-employment discrimination complaints. One of the reasons it gave was this does not fit 'with the EHRC's strategic role': HM Government, *Building a Fairer Britain: Reform of the Equality and Human Rights Commission* (March 2011) 18.

<sup>69</sup> See Productivity Commission, above n 46.

<sup>70</sup> It is also responsible for human rights. It was originally called the Commission for Equality and Human Rights and that remains its legal name: *Equality Act 2006* (UK) c 3, s 1. A separate institution exists in Northern Ireland.

<sup>71</sup> The Equality Advisory and Support Service is a separate service which provides advice to complainants. It was originally run by the EHRC before being moved to the Government Equalities Office in March 2012 which outsourced it to a private company: Helen Grant, 'New Equality Advisory and Support Service Is Launched' (Media Release, 15 November 2012). See also Government Equalities Office, *Information, Advice and Support on Equality and Human Rights Issues* (March 2011).

<sup>72</sup> Since 6 May 2014, this has been a compulsory step before a complainant can lodge their claim in the Employment Tribunal: *Employment Tribunals Act 1996* (UK) c 17, s 18A which was inserted by the *Enterprise and Regulatory Reform Act 2013* (UK) c 24, s 7(1).

<sup>73</sup> *Equality Act 2006* (UK) c 3, s 13.

<sup>74</sup> *Ibid* s 28.



The EHRC was formed in October 2007,<sup>75</sup> bringing together three older equality commissions – the Equal Opportunities Commission ('EOC'),<sup>76</sup> the Commission for Racial Equality ('CRE')<sup>77</sup> and the Disability Rights Commission ('DRC').<sup>78</sup> Evidently, the EHRC's formative years were difficult and included being subject to the Cameron government's 'Red Tape Challenge' to reduce regulation and bureaucracy.<sup>79</sup> To date, the EHRC has not engaged in enforcement work to the same degree as its predecessors.<sup>80</sup> Writing in 2012, Nick O'Brien said:

insofar as the EHRC has powers of enforcement in its own right, it seems that it has either been unnecessary or too challenging to make much use of them in a way that leads to the imposition of a sanction.<sup>81</sup>

Since the EHRC's predecessors had up to three decades' experience of enforcing anti-discrimination law, they are examined in the next section, which considers their enforcement powers in the context of Hepple, Coussey and Choudhury's pyramid. This reveals a more 'pointed' structure than in Australia. But it is not a complete pyramid due to the absence of punitive sanctions for recalcitrant or repeat offenders.<sup>82</sup>

<sup>75</sup> See *ibid* pt 1. On the background to the merger, see House of Lords and House of Commons Joint Committee on Human Rights, *Commission for Equality and Human Rights: The Government's White Paper* (Sixteenth Report of Session 2003–04, HL Paper 156 HC 998); Colm O'Connell, 'The Commission for Equality and Human Rights: A New Institution for New and Uncertain Times' (2007) 36(2) *Industrial Law Journal* 141; Anthony Lester and Kate Beattie, 'The New Commission for Equality and Human Rights' (2006) *Public Law* 197; Anthony Lester and Lydia Clapinska, 'An Equality and Human Rights Commission Worthy of the Name' (2005) 32(1) *Journal of Law and Society* 169; Tufyal Choudhury, 'The Commission for Equality and Human Rights: Designing the Big Tent' (2006) 13 *Maastricht Journal of European and Comparative Law* 311; Sarah Spencer, 'Equality and Human Rights Commission: A Decade in the Making' (2008) 79(1) *The Political Quarterly* 6; Hepple, *Equality*, above n 22, ch 7.

<sup>76</sup> On the early history of the EOC see Vera Sacks, 'The Equal Opportunities Commission – Ten Years On' (1986) 49 *The Modern Law Review* 560; Paul Byrne and Joni Lovenduski, 'The Equal Opportunities Commission' (1978) 1 *Women's Studies International Quarterly* 131; George Appleby and Evelyn Ellis, 'Formal Investigations: The Commission for Racial Equality and the Equal Opportunities Commission as Law Enforcement Agencies' [1984] *Public Law* 236.

<sup>77</sup> On the history of the CRE see Christopher McCrudden, David J Smith and Colin Brown, *Racial Justice at Work: Enforcement of the Race Relations Act 1976 in Employment* (Policy Study Institute, 1991) 8–29; Christopher McCrudden, 'The Commission for Racial Equality: Formal Investigations in the Shadow of Judicial Review' in Robert Baldwin and Christopher McCrudden (eds), *Regulation and Public Law* (Weidenfeld and Nicolson, 1987) 227, 228–42; Appleby and Ellis, above n 76.

<sup>78</sup> On the development of the DRC see O'Brien, above n 15.

<sup>79</sup> On the resulting changes to industrial relations law see Bob Hepple, 'Back to the Future: Employment Law Under the Coalition Government' (2013) 42(3) *Industrial Law Journal* 203.

<sup>80</sup> For an overview see Nick O'Brien, 'EHRC – Challenges and Opportunities: Impact of Enforcement Activities: Lion Tamer or Fly Swatter?' (Research Paper, 17 February 2012) 2.

<sup>81</sup> *Ibid* 4.

<sup>82</sup> Hepple has argued that the changes brought about by the *Equality Act 2006* (UK) and the *Equality Act 2010* (UK) have not moved the regulatory approach towards a model of responsive regulation: 'Agency Enforcement of Workplace Equality', above n 13.

## B The Enforcement Pyramid Applied to Britain

### 1 Level 1: Providing Information and Education

Like the AHRC, the EHRC provides information about the law to raise public awareness and encourage voluntary compliance. The EHRC states that informal action and cooperation are its preferred option and it only takes formal enforcement action if attempts to encourage compliance fail.<sup>83</sup> Both the previous and current British equality commissions could produce codes of practice admissible in court in relevant cases.<sup>84</sup> To date the EHRC has produced three codes of practice.<sup>85</sup> Section 14(2) of the *Equality Act 2006* (UK) states that codes are designed to ensure or facilitate compliance with the law or to promote equality of opportunity. The EHRC states that the codes '[s]et out clearly and precisely what the legislation means' and they are 'the authoritative source of advice for anyone who wants a rigorous analysis of the legislation's detail'.<sup>86</sup>

Before issuing a code, the EHRC must publish a draft and consult with stakeholders.<sup>87</sup> The Secretary of State must approve the draft code and lay it before Parliament and if neither House passes a resolution disapproving the draft within 40 days, it comes into force on a day appointed by the Secretary of State.<sup>88</sup> Failure to comply with the codes is not an offence but the code is admissible as evidence and can be taken into account in a case in which it is relevant.<sup>89</sup> For example, in *West Midlands Passenger Transport Executive v Singh* the Employment Appeal Tribunal took into account that the CRE's Code of Practice on racial equality recommended that an employer should monitor the racial composition of its workforce and so it permitted the complainant to seek discovery of the racial composition of the respondent's workforce.<sup>90</sup>

### 2 Level 2: Voluntary Action Plan

Organisations can choose to prepare an action plan, although the EHRC does not play a specific role in encouraging or coordinating this.<sup>91</sup> Organisations can use the Codes of Practice as the basis for an action plan.

<sup>83</sup> EHRC, above n 15, 6.

<sup>84</sup> See, eg, *West Midlands Passenger Transport Executive v Singh* [1987] IRC 837.

<sup>85</sup> The Code of Practice on Equal Pay, The Code of Practice on Employment and The Code of Practice on Services, Public Functions and Associations came into force on 6 April 2011.

<sup>86</sup> EHRC, *Equality Act Codes of Practice* <<http://www.equalityhumanrights.com/advice-and-guidance/information-for-advisers/equality-act-codes-of-practice>>. Similarly, British Anti-Discrimination lawyer Michael Rubenstein writes that the codes 'have not hesitated to set out the [DRC's] own interpretation of what the law means in practice': Michael Rubenstein, 'Why the DRC's Legal Strategy Succeeded' in DRC, *DRC Legal Achievements: 2000-2007* (Legal Bulletin Issue 12, Legacy Edition, 2007) 13.

<sup>87</sup> *Equality Act 2006* (UK) c 3, s 14(6).

<sup>88</sup> *Ibid* ss 14(7)-(8).

<sup>89</sup> *Ibid* s 15(4). The earlier Acts contained similar provisions. See, eg, *Race Relations Act 1975* (UK) c 74, s 47. On the history of the CRE's code-making capabilities and the process of drafting the first code, see Christopher McCrudden, 'Codes in a Cold Climate: Administrative Rule-Making by the Commission for Racial Equality' (1988) 51 *The Modern Law Review* 409.

<sup>90</sup> [1987] IRC 837. See also *Carrington v Helix Lighting Co* [1990] ICR 125.

<sup>91</sup> Public authorities may be required to prepare an action plan to fulfil the requirements of the positive duty to promote equality. See *Equality Act 2010* (UK) c 15, s 149.

### 3 *Level 3: Equality Commission Investigation*

The EHRC, like its predecessors, can conduct investigations into non-compliant organisations.<sup>92</sup> Yet this has not been the principal way it has enforced the law, primarily because of the experience of the oldest agencies, the CRE and EOC. When it established the CRE and EOC, the British Parliament expected them to act and to be seen to be acting as enforcement agencies, and investigations were expected to be their primary method of enforcing the law.<sup>93</sup> These would either be 'wide-ranging inquiries or confined to a particular organisation, undertaking or establishment'<sup>94</sup> and conducted in the public interest, rather than in the interests of an individual.<sup>95</sup> Christopher McCrudden, David Smith and Colin Brown write that the purpose of an investigation was to reach the types and degrees of discrimination that were unlikely to be addressed by individual litigation, to bring about changes in the behaviours of the organisations which were investigated, to increase equality of opportunity, and to do so in a strategic manner in order to improve equality.<sup>96</sup> The CRE and EOC could conduct two types of investigations: general inquiries which were not directed at a particular organisation and could only result in a report or recommendation, and 'belief' or 'accusatory' investigations into suspected unlawful acts committed by a named person which could result in a hearing and the issuing of a non-discrimination notice.<sup>97</sup>

At first, the CRE embarked on investigations with enthusiasm.<sup>98</sup> Hepple records that none of the companies the CRE investigated had equal opportunity policies and its investigations revealed the nature of discrimination and how to address it.<sup>99</sup> However, the CRE and the EOC faced judicial hostility to conducting investigations. Most famously, Lord Denning likened them to the Inquisition.<sup>100</sup> Linda Dickens writes that the courts 'showed a lack of appreciation of the CRE's conception of its public enforcement role and paid little heed to the wider strategic role of administrative enforcement', giving more concern to the rights of those who were the subject of the investigation.<sup>101</sup> A series of judicial decisions introduced 'cumbersome' administrative

<sup>92</sup> *Equality Act 2006* (UK) c 3, s 20(2).

<sup>93</sup> See Nicholas Bamforth, Maleiha Malik and Colm O'Cinneide, *Discrimination Law: Theory and Context* (Sweet and Maxwell, 2008) 1260.

<sup>94</sup> White Paper, *Racial Discrimination* (Cmnd 6234), Presented to Parliament by the Secretary of State for the Home Department by Command of Her Majesty September 1975, [110].

<sup>95</sup> *Ibid* [51].

<sup>96</sup> McCrudden, Smith and Brown, above n 77, 48.

<sup>97</sup> *Sex Discrimination Act 1975* (UK) c 65, ss 57–61, 67; *Race Relations Act 1976* (UK) ss 48–52, 58.

<sup>98</sup> Between 1977 and 1982, the CRE started 47 formal investigations of which 29 were into a named person alleging discrimination, 15 were into a named person but not alleging discrimination, and three were general: McCrudden, 'The Commission for Racial Equality', above n 77, 245. For a comprehensive account of the CRE's use of its investigations power, see also McCrudden, Smith and Brown, above n 77, chs 3, 4; Mary Coussey, 'The Effectiveness of Strategic Enforcement of the *Race Relations Act 1976*' in Bob Hepple and Erika M Szyszczak (eds), *Discrimination: The Limits of Law* (Mansell, 1992) 35, 38–40.

<sup>99</sup> Hepple, 'Agency Enforcement of Workplace Equality', above n 13, 53. See also Coussey, 'The Effectiveness of Strategic Enforcement of the *Race Relations Act 1976*', above n 98.

<sup>100</sup> *Science Research Council v Nasse* [1979] 1 QB 144, 172.

<sup>101</sup> Linda Dickens, 'The Road is Long: Thirty Years of Equality Legislation in Britain' (2007) 45(3) *British Journal of Industrial Relations* 463, 475.

procedures,<sup>102</sup> so before the commissions launched an investigation they were required to have a 'reasonable suspicion' that a 'named-person' had contravened the law, hold a preliminary inquiry to give that person the chance to respond, draw up terms of reference outlining their actual belief and stay within the confines of those terms during the investigation.<sup>103</sup> Belief investigations were subsequently scaled back.<sup>104</sup> Hepple writes that they were used by the CRE 'only as a last resort' if other methods of persuasion failed, while the EOC only conducted 11 investigations between 1997–2005 but the last was in 1995, 12 years before it closed.<sup>105</sup> Another problem with investigations was that once they launched an investigation, the CRE and EOC could not reach an agreement with the subject of the investigation as a form of settlement; they could only continue the investigation and seek the imposition of sanctions.<sup>106</sup> Due to these limitations, they conducted broader, thematic inquiries which could not lead to issuing a non-discrimination notice, so they did not have the opportunity to exercise their powers on the upper levels of the pyramid.

O'Brien writes that because of the EOC and CRE's experience, the DRC benefited from modified powers, particularly an 18 month time limit on investigations and the power to enter into agreements with non-compliant organisations. He says both have 'the potential to encourage a pragmatic approach'.<sup>107</sup> The DRC could enter into what it termed a 'voluntary binding agreement'<sup>108</sup> with an organisation that it believed was

<sup>102</sup> In *CRE v Amari Plastics* [1982] QB 1194 (*'Amari Plastics'*), Lord Denning MR described the procedural requirements as 'so elaborate and so cumbersome that [the investigation] is in danger of grinding to a halt': at 1201. The other decisions which impacted upon the conduct of investigations were *R v CRE, ex parte London Borough of Hillingdon* [1982] AC 779 and *Re Prestige Group plc* [1984] 1 WLR 335 (*'Prestige'*). See also Catherine Barnard, 'A European Litigation Strategy: The Case of the Equal Opportunities Commission' in Jo Shaw and Gillian More (eds), *New Legal Dynamics of European Union* (Clarendon Press, 1995) 258; O'Connell, 'The Commission for Equality and Human Rights', above n 74, 148–9; Appleby and Ellis, above n 75; McCrudden, 'The Commission for Racial Equality', above n 77, 252–8; Sacks, above n 75, 581–4.

<sup>103</sup> *Prestige* [1984] 1 WLR 335; *R v CRE, ex parte London Borough of Hillingdon* [1982] AC 779; *Amari Plastics* [1982] QB 1194. Following *Amari Plastics* the subject of the investigation could also challenge the CRE's findings of fact and the requirements of the non-discrimination notice. See also Michael Connolly and Richard Townshend-Smith, *Discrimination Law: Text, Cases and Materials* (Cavendish, 2<sup>nd</sup> ed, 2004) 553. On the drafting error that created this problem which was not rectified until the DRC was created in 1999: at 554. Dickens says the government ignored the CRE's calls for these laws to be reformed: Dickens, above n 100, 475.

<sup>104</sup> Appleby and Ellis write that the CRE abandoned nine formal investigations as a consequence of these decisions: Appleby and Ellis, above n 75, 264.

<sup>105</sup> Hepple, 'Agency Enforcement of Workplace Equality', above n 13, 53–4.

<sup>106</sup> McCrudden says there were occasions when organisations being investigated approached the CRE about negotiating a settlement and it refused. Its legal advice was that it could not negotiate an agreement when a notice could be issued: 'The Commission for Racial Equality', above n 77, 227, 249. Because of this, the DRC was given the power to enter into an agreement, as discussed below. This was retained when the EHRC was formed.

<sup>107</sup> O'Brien, 'The GB Disability Rights Commission and Strategic Law Enforcement', above n 15, 258–9. See also *Disability Rights Commission Act 1999* (repealed) (UK) c 17, s 3; Explanatory Notes, *Disability Rights Commission Act 1999* (repealed) (UK).

<sup>108</sup> The Act refers to them as an 'agreement': *Disability Rights Commission Act 1999* (repealed) (UK) s 5(1).

discriminating against people with a disability<sup>109</sup> which was 'intended to create a framework for ... organisations to address discrimination'.<sup>110</sup> The DRC would undertake not to take further enforcement action,<sup>111</sup> and the organisation would agree not to commit further unlawful acts and to take the action specified in the agreement. This had to be action that would change practices, policies and procedures which caused or contributed to the unlawful acts or were liable to lead to a failure to comply with the undertaking in the future.<sup>112</sup> The agreement was enforceable by the DRC.<sup>113</sup> Between 1 April 2004 and 31 July 2007, the DRC entered into 11 agreements.<sup>114</sup> For example, in an agreement reached with the DRC, retailer Jessops agreed to make adjustments to its premises within 12 months after a customer with a disability was prevented from entering the shop because of steps in the entryway. In another agreement, retailer Debenhams agreed to improve access to its department stores and to make the mezzanine levels in 16 of its stores accessible to people with disabilities within six months of the agreement.<sup>115</sup> A court could not have ordered these remedies if the matters were litigated<sup>116</sup> yet the DRC was able to negotiate them. An independent report by the Office for Public Management found that the agreements were well received by those who entered into them.<sup>117</sup> O'Brien says that due to the CRE's experience, a fear of investigations remained, so the DRC felt it needed to establish a relatively high level of suspicion that there had been unlawful conduct and to have tight terms of reference for the investigation.<sup>118</sup> The DRC did not commence its first investigation until 2003 and it

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<sup>109</sup> Ibid.

<sup>110</sup> Dudley Westgate, 'A Company's Perspective – Entering Into a "Voluntary Binding Agreement" with the DRC' in DRC, *DRC Legal Achievements: 2000–2007* (Legal Bulletin Issue 12, Legacy Edition, 2007) 54.

<sup>111</sup> Agreements were also reached after the DRC agreed to provide financial assistance to a person with a disability so they could pursue their claim but the effect was the same; enforcement action was suspended: *Disability Rights Commission Act 1999* (repealed) (UK) s 5(2)(a).

<sup>112</sup> Ibid s 5. The EHRC can also enter into an agreement in lieu of enforcement action. The EHRC can enter into an agreement and seek an injunction to ensure the recipient complies with it. The respondent is not taken to have admitted to a contravention by entering into the agreement. They undertake not to commit the unlawful act or to refrain from taking action or to complete the positive steps specified in the agreement which could include completing an action plan: *Equality Act 2006* (UK) c 3, ss 23, 24. Only four examples of such agreements are recorded on its website: EHRC, *Enforcement Work* (21 June 2016) <<https://www.equalityhumanrights.com/en/legal-casework/enforcement-work>>.

<sup>113</sup> *Disability Rights Commission Act 1999* (repealed) (UK) s 5(8).

<sup>114</sup> DRC, *DRC Legal Achievements: 2000–2007* (Legal Bulletin Issue 12, Legacy Edition, 2007) 144.

<sup>115</sup> Ibid 124–5. The DRC did not enter into any agreements in relation to employment: at 144. It is noted that both agreements were reached in the context of the DRC assisting the complainant with their matter rather than following an investigation but this illustrates the wider, systemic change that agreements can lead to compared with litigation.

<sup>116</sup> Only damages would have been available: *Disability Discrimination Act 1995* (UK) c 13, s 25.

<sup>117</sup> Office for Public Management, *Evaluating the Impact of the Disability Rights Commission: Summary Report* (2007), 45. See also the article by Dudley Westgate, the Director of Heritage Attractions Ltd, discussing his company's experience in entering into an agreement with the DRC and the subsequent benefits to his organisation: above n 110, 54–6.

<sup>118</sup> O'Brien, 'The GB Disability Rights Commission and Strategic Law Enforcement', above n 15, 259.

only completed two more before closing, but they were general, themed investigations.<sup>119</sup>

The EHRC can initiate and conduct investigations if it suspects that an unlawful act has been committed<sup>120</sup> and it can enter into a binding enforceable agreement with a person who it believes has committed an unlawful act in lieu of further enforcement action.<sup>121</sup> The EHRC says that it also enters into less formal agreements with organisations which are not enforceable and that increasingly, agreements contain a confidentiality clause.<sup>122</sup> For example, in November 2009 it entered into an agreement with a healthcare provider, the Priory Group, to improve access to its services for people with a disability following instances of clients in a wheelchair who were unable to access its services.<sup>123</sup>

Hepple writes that a single complaint about unlawful conduct is unlikely to be enough for the EHRC to decide to commence an investigation but a series of events over time might be.<sup>124</sup> The EHRC has not launched many investigations to date.<sup>125</sup> The EHRC has predominantly conducted inquiries into industries or sectors<sup>126</sup> which can only lead to recommendations.<sup>127</sup> Most of these were commenced soon after it began operating in 2007. The political problems it has faced and the cuts to its budget and staff go some way to explaining its lack of activity.

119 They were 'The Web: Access and Inclusion for Disabled People' (2004), 'Equal Treatment: Closing the Gap: A Formal Investigation Into Physical Health Inequalities Experienced by People With Learning Disabilities and/or Mental Health Problems' (2006) and 'Maintaining Standards: Promoting Equality: Professional Regulation Within Nursing, Teaching and Social Work and Disabled People's Access to These Professions' (2007). For an overview see *DRC*, above n 114, 134-6.

120 *Equality Act 2006* (UK) c 3, s 20(2). The EHRC is required to send a draft report to the person and give them the opportunity to make a written representation about the draft which it must consider: at s 20(4). Further procedural requirements are contained in sch 2 which codifies the jurisprudence about the previous commissions' equivalent powers following the *Prestige* decision.

121 *Equality Act 2006* (UK) c 3, ss 23, 24(2). Alternatively, the EHRC can seek an injunction to prevent a person from committing an unlawful act: at s 24(1).

122 EHRC, *Enforcement Work*, above n 112.

123 EHRC, 'Commission Signs Agreement With the Priory Group' (Media Release, 23 November 2009).

124 Hepple, 'Agency Enforcement of Workplace Equality', above n 13, 185.

125 At the time of writing its most recent update on its enforcement activities listed one investigation, which was launched in September 2014, and one agreement: EHRC, *Enforcement Snapshot October 2015* (2015) <<http://www.equalityhumanrights.com/legal-and-policy/commission/enforcement-powers>>.

126 For example, it has conducted inquiries into home care for older people in England, disability-related harassment and board diversity in the finance sector. See EHRC, *Inquiries and Investigations* <<http://www.equalityhumanrights.com/legal-and-policy/our-legal-work/inquiries-and-investigations>>.

127 *Equality Act 2006* (UK) c 3, s 16.

#### 4 *Level 4: Compliance Notice*

The EHRC, like its predecessors, can issue an 'unlawful act notice',<sup>128</sup> which Chi-hye Suk describes as functioning like 'cease and desist orders'.<sup>129</sup> The EHRC can serve an unlawful act notice following a named person investigation and the recipient has the right of appeal to the relevant court.<sup>130</sup> When the EHRC serves an unlawful act notice, it can require the organisation to prepare and act on an action plan to avoid the breach reoccurring or to stop its continuation.<sup>131</sup> The action plan must be approved by the EHRC. It can enforce the action plan for five years after the action plan comes into force,<sup>132</sup> in accordance with Hepple, Coussey and Choudhury's model.<sup>133</sup> There are no published examples to date of the EHRC doing this. Alternatively, the EHRC could recommend action to be taken to avoid repeating or continuing the unlawful act.<sup>134</sup>

#### 5 *Level 5: Judicial Enforcement*

If the EHRC thinks an organisation is likely to commit an unlawful act, or if the organisation fails to comply or is likely to fail to comply with an agreement, the EHRC can seek a court order requiring compliance.<sup>135</sup>

#### 6 *Level 6: Sanction*

As discussed above, the EHRC may apply for an order requiring a person to prepare an action plan. Failure to comply with an order is a criminal offence and may result in the imposition of a fine.<sup>136</sup> It cannot, however, seek the imposition of a sanction or penalty against a non-compliant respondent in any other context. It can seek an injunction if it believes a person is likely to commit an unlawful act, a breach of which would constitute contempt of court and that could lead to severe sanctions.<sup>137</sup> As of April 2014, Employment Tribunals in Britain have been able to order an employer to pay a penalty of between £100–5000 if the breach has one or more aggravating features.<sup>138</sup> What constitutes such features is not defined in the Act but the Explanatory Notes state that the factors the Tribunal may consider could include the size of the employer, the duration of the breach and the behaviour of the employer and employee.<sup>139</sup>

#### 7 *Level 7: Withdrawal of Contracts or Licences*

Withdrawing a contract or licence is not a penalty for breaching anti-discrimination laws in Britain.

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128 Its power to issue a compliance notice relates to the public sector equality duties only: *ibid* s 32.

129 Suk, above n 14, 444.

130 *Equality Act 2006* (UK) c 3, s 21.

131 *Ibid* s 21(4).

132 *Ibid* s 22.

133 Hepple, Coussey and Choudhury, above n 7, 58.

134 *Equality Act 2006* (UK) c 3, s 21.

135 *Ibid* s 24.

136 *Equality Act 2006* (UK) c 3, s 21.

137 Connolly and Townshend-Smith, above n 103, 563.

138 *Employment Tribunals Act 1996* (UK) c 17, s 12A which was inserted by the *Enterprise and Regulatory Reform Act 2013* (UK) c 24, s 16.

139 Explanatory Notes, *Enterprise and Regulatory Reform Act 2013* (UK) [100].

In comparison with the AHRC, the shape of enforcement by the EHRC and its predecessor is more pointed and triangular. The UK commissions (particularly the EHRC) have not used all of their powers as originally anticipated, and without a sanction at the apex of the pyramid, they do not reflect Hepple, Coussey and Choudhury's enforcement pyramid in its entirety but they are far closer than the Australian model.

## V THE ENFORCEMENT OF ANTI-DISCRIMINATION LAWS BY A STATUTORY AGENCY

Part V discusses what the examination of the equality commissions in Australia and Britain through the lens of Hepple, Coussey and Choudhury's enforcement pyramid reveals about the enforcement of anti-discrimination laws by a statutory agency. This is informed by Braithwaite and Hepple, Coussey and Choudhury's ideas, particularly the idea of responsive regulation, which Hepple, Coussey and Choudhury define as 'the idea that regulation needs to be responsive to the different behaviour of the various organisations subject to regulation.'<sup>140</sup>

### A Clearly Define the Equality Commission's Role

The first lesson one can take from the experience of the equality commissions is that it is important for the government to be clear about the equality commission's role and what it is expected to do. When it established the EOC and CRE, the British government clearly intended for them to be enforcement agencies and to exercise their powers as such, although this did not ultimately eventuate. The Blair government also regarded the EHRC as a regulatory body which would use its powers to tackle 'deep-rooted and systematic discrimination.'<sup>141</sup>

Equally important is how the equality commission regards itself. O'Brien says that there are three possibilities. The first is as an advocate which represents the interests of vulnerable groups. The second is as a regulator who wields a big stick and the third is as an instrument of social change which mixes both advocacy and regulation. He argues that by being both advocate and regulator, an equality commission can become a mix of a law centre and legal aid provider, but it should never play all of these roles.<sup>142</sup> Similarly, Hepple, Coussey and Choudhury write:

The primary objective of the commission is not to represent interest groups or to give them a voice. ... The main objective of the commission is to act as an organ of government

<sup>140</sup> Hepple, Coussey and Choudhury, above n 7, 57.

<sup>141</sup> White Paper, *Fairness For All: A New Commission for Equality and Human Rights* (Cm 6185), Presented to Parliament by the Secretary of State for Trade and Industry and the Secretary of State for Constitutional Affairs by Command of Her Majesty, May 2004, 19, 43.

<sup>142</sup> Nick O'Brien, 'Accentuating the Positive: Disability Rights and the Idea of a Commission for Equality and Human Rights' (Paper presented at the Industrial Law Society, St Catherine's College, Oxford, 10 September 2004). This was also the opinion of a senior lawyer who had worked at the EHRC: Interview (London, 20 May 2014). Fletcher and O'Brien write that the CRE and EOC played a role more akin to that of a law centre after their investigations power was curtailed and they focused on funding litigation: Agnes Fletcher and Nick O'Brien, 'Disability Rights Commission: From Civil Rights to Social Rights' (2008) 35 *Journal of Law and Society* 520, 530.



promoting change in organisations and, where appropriate helping individuals to assert their rights. The commission's essential role is to promote equality and to ensure that resources are focused on the most important strategic issues.<sup>143</sup>

Being strategic will guide the equality commission's enforcement activities, such as who or what to investigate, and how it subsequently exercises its enforcement powers.<sup>144</sup> The DRC was very successful at this. Reflecting on his time as the DRC's Director of Legal Services, O'Brien writes:

With inevitably limited resources, a publicly funded equality commission faces hard choices in prioritising its activities. The aspiration, in the provision of legal services, must be that every case really counts as a significant contribution to the broader strategic agenda.<sup>145</sup>

## **B A Range of Enforcement Powers**

The second lesson is that the equality commission needs to not only possess but also use enforcement powers at each level of the pyramid and apply them according to the nature of the non-compliance. Braithwaite writes that the presumption should be to start at the base of the pyramid and escalate to more punitive measures reluctantly once modest sanctions have failed.<sup>146</sup> This is, in essence, responsive regulation. Similarly, Hepple, Cousseay and Choudhury write:

Although regulators start with attempts to persuade ... they need to be able to rely on progressively more deterrent sanctions until there is compliance. There must be a gradual escalation of sanctions and, at the top, sufficiently strong sanctions to deter even the most persistent offender.<sup>147</sup>

However, this has not occurred in either jurisdiction. The Australian model is flat and focused on encouraging voluntary compliance, and although the British model is much more triangular, it is not a complete pyramid and the EHRC has not used its enforcement powers as anticipated.

The success of this type of regulation depends upon there being a real threat that if an organisation does not comply voluntarily, sanctions will be imposed.<sup>148</sup> Smith writes that to be effective, the threat of a sanction must be credible and it should be reserved for the most recalcitrant offenders.<sup>149</sup> Niall Crowley, the former Chief Executive Officer of the Irish Equality Authority, writes:

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<sup>143</sup> Hepple, Cousseay and Choudhury, above n 7, 52–3.

<sup>144</sup> Indeed, in the British government's White Paper it said it expected the EHRC to take a strategic approach to using its enforcement tools: *Fairness For All*, above n 141, 41.

<sup>145</sup> O'Brien, 'The GB Disability Rights Commission and Strategic Law Enforcement', above n 15, 253.

<sup>146</sup> John Braithwaite, 'The Essence of Responsive Regulation' (2011) 44 *UBC Law Review* 475, 482.

<sup>147</sup> Hepple, Cousseay and Choudhury, above n 7, 57.

<sup>148</sup> Braithwaite, 'Rewards and Regulation', above n 8. See also Hepple, Cousseay and Choudhury, above n 7, 57. It was outside the scope of this article to explore what effect the problems with investigations and the minimal use of the upper level sanctions has had on compliance. Regulatory theory suggests that it would have had a negative impact on compliance but arguably this was alleviated by the equality commissions' assistance work. Cf Fletcher and O'Brien, who regard this work as legal aid by another route: above n 142, 531.

<sup>149</sup> Smith, above n 20, 725.

Employers and service providers need to be clear that where discrimination happens enforcement will follow. The legislation needs to be seen to be regularly enforced or it will fail to have any significant impact.<sup>150</sup>

Moreover, a credible threat that the law will be enforced shows that the state has a vested interest in seeing discrimination eliminated; it is in the public interest, not just a private matter. Sacks writes: 'The enforcement of the law by a state agency educates the community both as to the law itself and on the importance accorded by the state to the elimination of discrimination'.<sup>151</sup>

The threat of a sanction being imposed increases the motivation for respondents to comply, which may then lead to a positive outcome much earlier. Currently this is absent in both jurisdictions. Hefty sanctions, such as civil penalties or withdrawing contracts, cannot be imposed for breaches of anti-discrimination law; only compensatory remedies are available. Moreover, in Australia the likelihood that the law will be enforced is low and compensation is awarded at relatively low amounts.<sup>152</sup> A related problem is that if the court takes into account that the respondent's breach was unintentional, it will reduce the compensation award.<sup>153</sup> Rather than indicating that the court does not regard that respondent to be as blameworthy as other respondents, this suggests that the complainant did not suffer the degree of harm that was claimed. If the court could impose civil penalties, the respondent's inadvertent breach would be taken into account when determining that amount, leaving the compensation payment intact.<sup>154</sup> Thus the equality commission needs to possess powers at the upper level and apex of the enforcement pyramid so that the middle level powers can work effectively.

### C A Functional Investigations Procedure

In Appleby and Ellis' view, there are five instances in which investigations will be the best way to remedy discrimination: cases of 'victimless discrimination', which relate to attitudes and behaviours that have existed for a long time which perpetuate

<sup>150</sup> Niall Crowley, *An Ambition for Equality* (Irish Academic Press, 2006) 44. Former Chair and CEO of the CRE, Lord Ouseley, said that for the first seven years the EHRC operated, organisations did not fear that it would be 'likely to be knocking on their doors and asking them questions about their policies on equality.' His Lordship continued that Britain needs an independent body that is 'able to say we will take regulatory action, we will enforce the law against you where you are failing to conduct yourself in a lawful manner with regard to equalities': Quoted in Amelia Gentleman, 'Herman Ouseley Says Equality and Human Rights Commission Has Failed', *The Guardian* (London), 29 November 2012.

<sup>151</sup> Sacks, above n 76, 568.

<sup>152</sup> Elliott, above n 42; Chapman, above n 43.

<sup>153</sup> Smith has also recognised this failing of anti-discrimination law: Belinda Smith, 'It's About Time – For A New Regulatory Approach to Equality' (2008) 36 *Federal Law Review* 1, 19; Smith, 'Not the Baby and the Bathwater', above n 20, 714–15.

<sup>154</sup> Cf the FWO's power to seek civil penalties for workplace discrimination in s 539 of the FWA. In *Fair Work Ombudsman v Drivecam Pty Ltd* (2011) 208 IR 79, in determining the civil penalty Emmett FM took account of the fact that the employer did not intend to discriminate or exploit the employee's disability: at [75]. In *Fair Work Ombudsman v Wongtas Pty Ltd [No 2]* [2012] FCA 30 (2 February 2012), Cowdroy J took into account that the respondent initially challenged the FWO's power to bring the action and it did not take any corrective action in response to the FWO's inquiries. Instead, it terminated the employee: at [53]–[56]. See also Smith, 'It's About Time', above n 153.

disadvantage; situations which affect a group of people when it would be costly and time consuming for individuals to pursue a claim; cases where the facts and practices are complicated and beyond the capacity of an individual; circumstances where the affected individual is a member of a group and the equality commission feels it is in the interests of the group to investigate the matter; and matters in the public interest.<sup>155</sup> The British experience shows that a poorly drafted investigations procedure or an equality commission that takes an adversarial approach to investigations can nullify the benefits of this function.<sup>156</sup>

It may be said that some of the problems the original British equality commissions faced in conducting investigations were a product of the time in which those commissions commenced operating. Sex and racial discrimination legislation were new and not well understood, so there was less compliance.<sup>157</sup> The CRE took an aggressive approach to enforcing the new law to the extent that Hepple describes it as acting like 'an inspectorate'.<sup>158</sup> It is fair to say that over the past four decades, society's understanding of discrimination has changed and compliance has increased.<sup>159</sup> Today one would expect an equality commission to regulate responsively, so an organisation that assisted the equality commission with its investigation and responded well to a finding of non-compliance would be treated differently from one that was hostile and not prepared to address the problem.<sup>160</sup> However, in both instances the equality commission would start at the base of the pyramid and scale it only reluctantly.<sup>161</sup> The British experience shows that it is better to conduct investigations in a conciliatory fashion with procedural safeguards – such as requiring the equality commission to have grounds for launching an investigation, which it must communicate to the respondent – and a degree of confidentiality. It also shows that the procedures must not become so cumbersome that they prevent the commission from conducting any investigations at all.

#### D Weighing the Public Interest Against Private Interests

As Sacks writes, investing the equality commission with a role in enforcing the law shows that eradicating discrimination is in the public interest.<sup>162</sup> One of the challenges for the equality commission is how to balance the public interest against the complainant's interest in having their discrimination complaint resolved. One of the ways the equality commission will become aware of ongoing or systemic discrimination that requires its attention will be through individual complaints (most likely multiple individual complaints). The individual will be prevented from receiving a remedy while

<sup>155</sup> Appleby and Ellis, above n 76, 274.

<sup>156</sup> One of the problems with the early investigations launched by the CRE and EOC was that their approach was quite adversarial and organisations reacted in kind by briefing lawyers and challenging the basis of the investigation. See the example discussed by Sacks, above n 76, 584–5.

<sup>157</sup> Hepple, 'Agency Enforcement of Workplace Equality', above n 13, 53.

<sup>158</sup> Bob Hepple, 'Enforcing Equality Law: Two Steps Forward and Two Steps Backwards for Reflexive Regulation' (2011) 40 *Industrial Law Journal* 315, 317.

<sup>159</sup> This is evidenced by the number of organisations which have submitted disability action plans, for example. See AHRC, *Register of Disability and Discrimination Act Action Plans*, above n 58.

<sup>160</sup> See also Smith, 'Not the Baby and the Bathwater', above n 20.

<sup>161</sup> Braithwaite, 'The Essence of Responsive Regulation', above n 146, 483.

<sup>162</sup> Sacks, above n 76.

the commission conducts an investigation and uses its upper level enforcement powers. This may not be in the complainant's interest. However, it is not compulsory for the individual to take their complaint to the equality commission for further investigation. They can resolve it independently through ADR or the courts. Even so, it will be necessary for the equality commission to make those who bring complaints to it aware of the consequences of doing so and for the commission to be flexible and responsive in the approach it takes to each instance of non-compliance so as to balance these competing interests.

## VI CONCLUSION

Equality commissions play a vital role as the educators, watchdogs and enforcers of anti-discrimination laws, particularly in a country like Australia which does not prohibit discrimination or guarantee equality in its Constitution. O'Brien and Caroline Gooding write:

An Equality Commission has a privileged role in speaking with an authoritative voice, in being the guardian of its core legislation and in defining for itself a niche role in enabling social change of a kind that is consistent with human rights principles and with real equality.<sup>163</sup>

Underlying the discussion in this article is the importance of resourcing.<sup>164</sup> Without sufficient funding, equal opportunity agencies are not able to engage in important enforcement work. Indeed, it has been the situation in Australia that cutting funding is one way a government can 'muzzle' a watchdog.<sup>165</sup> It will be necessary to consider how best to protect not only the equality commission's resources but also its independence and special status. Independence guaranteed by legislation or the Constitution is one of the requirements of the Principles Relating to the Status of National Institutions.<sup>166</sup> It is beyond the scope of this article to do this,<sup>167</sup> but it is worth noting that government is an employer and a service provider and may well find itself subject to enforcement action, so how best to protect an equality commission from attack must be considered.

This article has argued that there are valuable reasons for having a public institution charged with enforcing anti-discrimination law because it will encourage voluntary compliance by increasing the threat that action will be taken against non-compliant organisations. The presence of a regulator reminds the community that something is being done to address discrimination. While this model does not rely solely on the individual to enforce the law, it still addresses discrimination after the fact, with an eye towards preventing future breaches. It is important to note, in conclusion, that more thought needs to be devoted to ways of proactively addressing discrimination rather

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<sup>163</sup> Nick O'Brien and Caroline Gooding, 'Final Reflections' in DRC, *DRC Legal Achievements: 2000-2007* (Legal Bulletin Issue 12, Legacy Edition, 2007) 155.

<sup>164</sup> For further discussion see Harvey and Spencer, above n 14, 1668-80.

<sup>165</sup> For example, in 1993 the Victorian Equal Opportunity Commissioner found herself without a job when her position was abolished following the commission's 14 month long investigation into prison conditions: Christopher Richards and Tim Winkler, 'Moirra Rayner's Job Axed in Revamp', *The Age* (Melbourne), 27 October 1993, 1.

<sup>166</sup> *National Institutions for the Promotion and Protection of Human Rights*, GA Res 48/134, 85<sup>th</sup> mtg (20 December 1993) annex.

<sup>167</sup> For example, the Equality Commission for Northern Ireland was established by the Belfast ('Good Friday') Agreement of 1998, which was codified by the *Northern Ireland Act 1998* (UK).

than waiting until it has already occurred in order to effectively tackle ongoing discrimination and inequality.

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# Settling sexual harassment complaints – what benefits does ADR offer?

Dominique Allen\*

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*Sexual harassment complaints are predominantly resolved through confidential alternative dispute resolution (ADR) processes rather than a tribunal hearing, so very little is known about the type of complaints which are made or how they are being resolved. This secrecy has created problems for the law's development and its effectiveness. This article compares settlement agreements negotiated through ADR with tribunal orders, so as to identify whether ADR offers any additional benefits to the process of addressing sexual harassment and to identify changes to the process which would increase the law's effectiveness while maintaining the benefits of ADR. Very little is known about the type of settlements negotiated in this jurisdiction, so the secondary purpose of the study is to provide information about how sexual harassment is being addressed.*

## INTRODUCTION

When Kristy Fraser-Kirk announced she was suing retailer David Jones for \$37 million for, inter alia, sexual harassment in 2010,<sup>1</sup> many were surprised at the amount of damages she was seeking. One lawyer noted that \$37 million is twice what a person who became a quadriplegic, blind or brain-damaged at work could expect in compensation.<sup>2</sup> Fraser-Kirk later settled the matter for a rumoured \$850,000, which is very high in comparison to the damages courts usually award for sexual harassment.<sup>3</sup> Undoubtedly, her case has brought welcome national attention to the ongoing problem of sexual harassment in the workplace and the settlement amount stands as a deterrent to would-be harassers. These are benefits that the law is rarely able to offer because the case was unusual. The majority of sexual harassment complaints are resolved through compulsory alternative dispute resolution (ADR) procedures, which entail a confidential settlement, and such cases do not usually attract the kind of media attention that the Fraser-Kirk matter attracted. As a result, the community is not aware to what extent sexual harassment continues to exist or how it is being addressed. Significantly, the confidential nature of the process makes it difficult to ascertain whether settlements are likely to have any effect on eradicating sexual harassment.

Most sexual harassment complaints are resolved through compulsory ADR, rather than a tribunal hearing. The dominance of settlement, a by-product of ADR, has created problems for the law's development and its effectiveness. This article compares the settlements negotiated in sexual harassment complaints with the orders made by the tribunal. The purpose of this comparison is to identify whether ADR offers additional benefits to this area of law. Very little is known about the type of settlements negotiated in this jurisdiction, so the secondary purpose of the study is to provide information about how sexual harassment is being addressed. The process of resolving a sexual harassment complaint is much the same across the Australian jurisdictions, and Queensland provides

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<sup>1</sup> Minus J and Ooi T, "David Jones Sued for \$37m Over Sex Bullying", *The Australian* (3 August 2010).

<sup>2</sup> See Gerard Phillips quoted in Moran J and Harvey C, "Kristy Fraser-Kirk Scandal Extracts Big Price", *The Daily Telegraph* (17 October 2010).

<sup>3</sup> For instance, a compensation award of \$463,000 stands as the highest award in a federal sex harassment case since the Federal Court began hearing matters in 2000: *Poniatowska v Hickinbotham* [2009] FCA 680.

the setting for this study. The focus of this article is on the outcomes negotiated through ADR; it is not concerned with ADR processes or the effectiveness of using ADR to resolve complaints in the equal opportunity jurisdiction.<sup>4</sup>

## SEXUAL HARASSMENT AND THE ADR PROCESS

Sexual harassment is prohibited federally and in each State and Territory<sup>5</sup> but although it has been prohibited for almost 30 years, it continues to occur. For instance, in the 2011/2012 financial year the Australian Human Rights Commission (AHRC) received 262 sexual harassment complaints<sup>6</sup> and the Queensland Anti-Discrimination Commission (QADC) accepted 75 complaints.<sup>7</sup> The AHRC's 2012 national telephone survey found that one in five people over the age of 15 had experienced sexual harassment in the workplace.<sup>8</sup> In the same year, the Victorian Equal Opportunity and Human Rights Commission conducted a survey of female lawyers in private practice which found that almost 24% had experienced sexual harassment while working in Victoria.<sup>9</sup>

Each jurisdiction deals with sexual harassment complaints in a similar fashion.<sup>10</sup> A person who has been subject to sexual harassment can lodge a complaint at the statutory equal opportunity agency in their jurisdiction or at the AHRC. If the agency accepts the complaint, the parties will attempt to resolve it through conciliation. There is no limit on the outcomes the parties can negotiate. The conciliation process is confidential<sup>11</sup> and settlement agreements usually include a confidentiality clause which prevents the parties from discussing the circumstances of the complaint and the settlement. If the complaint cannot be resolved at conciliation, the complainant may decide to lodge the complaint at a civil tribunal or in the Federal Court where it will usually undergo mediation before a hearing.

Complaints are more likely to be settled or withdrawn than proceed to court, as shown by the data discussed later in this article, and so each year the courts hear very few sexual harassment complaints. It is outside the scope of this article to consider why parties prefer to settle but, briefly, in an earlier study of Victoria, the author found that settlement occurred frequently due to the cost of litigation, low compensation awards, the unlikelihood of a recovering costs, the stress of a trial, and the desire to resolve the matter.<sup>12</sup>

ADR is a compulsory part of the process for sexual harassment complaints<sup>13</sup> and potentially the parties will participate in two ADR processes<sup>14</sup> before they reach a court hearing. The advantages of using ADR to resolve sexual harassment complaints are that it is cost-free, facilitated by the equal opportunity commissions, and it is an easier process to navigate than litigation, particularly for those

<sup>4</sup> On this, see Allen D, "Behind the Conciliation Doors: Settling Discrimination Complaints in Victoria" (2009) 18(3) *Griffith Law Review* 776.

<sup>5</sup> See, for example, the *Anti-Discrimination Act 1991* (Qld), s 118. Unlike other jurisdictions, in Queensland, sexual harassment is prohibited in employment and non-employment. See *Wilson & McCollum v Lawson* [2008] QADT 27 in which a mother and her adult son were found to have sexually harassed their neighbours in a suburb of Brisbane.

<sup>6</sup> This constituted 25% of complaints received under the *Sex Discrimination Act 1984* (Cth): AHRC, *Annual Report 2011-2012* (2012), Appendix 3, Table 23.

<sup>7</sup> This constituted 12.4% of accepted complaints: QADC, *Annual Report 2011-2012* (2012), Table 7.

<sup>8</sup> AHRC, *Working Without Fear: Results of the Sexual Harassment National Telephone Survey 2012* (2012) at [4.1].

<sup>9</sup> Victorian Equal Opportunity and Human Rights Commission, *Changing the Rules* (2012) p 30. See generally Ch 4.

<sup>10</sup> The exception is Victoria. Since 2011, complainants in Victoria have had the option to lodge their complaints directly at the civil tribunal and bypass the equal opportunity commission's process: *Equal Opportunity Act 2010* (Vic), Pt 8. Both the commission and the tribunal use ADR.

<sup>11</sup> For example, see *Australian Human Rights Commission Act 1986* (Cth), s 46PK.

<sup>12</sup> Allen, n 4 at 786ff.

<sup>13</sup> There is a different process in Victoria but complaints are still usually subject to mediation as part of the tribunal's case management practices.

<sup>14</sup> On the variations in the type of processes used, see Allen D, "Against Settlement? Owen Fiss, ADR and Australian Discrimination Law" (2010) 10(4) *International Journal of Discrimination and the Law* 191 at 192-194.

without legal representation. Furthermore, ADR is a quicker, more expedient process than litigation and the speed of the process is regulated by legislation.<sup>15</sup> Finally, the parties can settle for any outcome they agree to; they are not constrained by the remedies in the legislation. However, the advantages must be weighed against the problems it has caused for the law's development. First, the outcomes negotiated through ADR are confidential so the community is not aware that sexual harassment remains a problem, nor is it possible to assess whether the complainant's rights are being upheld in the settlements negotiated. Secondly, because ADR is compulsory and its purpose is to procure settlement, most complaints settle, so courts have very few opportunities to interpret the law. This limits the law's ability to set standards or change behavior through deterrence.

Although the equal opportunity agencies receive sexual harassment complaints and facilitate the conciliation process, they do not release information about the nature of complaints or the contents of the settlement agreements. Examples of "typical" complaints may be included on their website or in educative material but no information is collated and released on a regular basis even in a de-identified form. Apart from the few complaints which make it to court or into the public sphere through media attention, little is known about how sexual harassment is being addressed in Australia. Recently, Charlesworth et al were able to access data from complaints about sexual harassment in employment lodged at the nine equal opportunity agencies in Australia between 1 July and 31 December 2009.<sup>16</sup> During that time, the agencies accepted 266 complaints and referred 202 complaints to conciliation. A settlement was reached in 136 complaints before, during or after attending conciliation.

As well as presenting data on the content of complaints, the parties and the complaint resolution process, Charlesworth et al's study includes data on the settlement agreements negotiated at the equal opportunity commission stage.<sup>17</sup> A range of outcomes was apparent from the settlement agreements but compensation was the most common outcome and featured in 72.1% of settlements. Although the compensation amounts ranged from \$364 to \$114,128, almost 38% settled for less than \$4,999 and only 6.3% were above \$50,000. The average amount of compensation was \$13,596.31 and the median was \$7,000. The next most common outcomes were an apology/statement of regret/acknowledgement of sexual harassment, which featured in 35.3% of settlements, and education/equal employment opportunity (EEO) programs/training/professional development which featured in 24.3% of settlements. Almost 17% of settlements included a confidentiality agreement.

Charlesworth et al's study provides valuable data on the outcomes negotiated following acceptance of sexual harassment complaints by one of Australia's nine equal opportunity agencies but it does not consider settlements negotiated through ADR at the next stage of the process or compare them to remedies awarded by a civil tribunal. The study presented in this article evaluates outcomes at each stage of the process, though it is limited to one jurisdiction, and considers what additional benefits ADR offers complainants in sexual harassment matters.

## **A STUDY OF SEXUAL HARASSMENT COMPLAINTS IN QUEENSLAND**

### **The process of resolving sexual harassment complaints**

An individual who has experienced sexual harassment in Queensland can lodge a complaint at the QADC.<sup>18</sup> If the QADC accepts the complaint,<sup>19</sup> it will investigate and attempt to resolve it through

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<sup>15</sup> For example, in Queensland, the equal opportunity agency must decide whether to accept or reject the complaint within 28 days and if it has not finished dealing with the matter six months after it was accepted, either party may ask the Commissioner to refer the complaint to the tribunal which must accept it: *Anti-Discrimination Act 1991* (Qld), ss 141, 164A, 175.

<sup>16</sup> Charlesworth S, McDonald P, Worley A, Graham T and Lykhina A, *Formal Complaints of Workplace Sexual Harassment Lodged with Australian Human Rights and Equal Opportunity Commissions 1 July 2009 – 31 December 2009* (Centre for Work + Life, University of South Australia, 2012) pp 1, 28.

<sup>17</sup> See Charlesworth et al n 16, pp 28-30.

<sup>18</sup> Complaints can be lodged on the basis of multiple attributes. As discussed below, sexual harassment complaints are often also lodged on the basis of sex discrimination.

<sup>19</sup> That is, the complaint was not out of time, regarded as frivolous and vexatious or lacking in substance and it had not been dealt with elsewhere: *Anti-Discrimination Act 1991* (Qld), ss 138-140.



conciliation.<sup>20</sup> The only legislative requirement about conciliation is that it must be held in private and the process is confidential.<sup>21</sup> If the complaint is resolved, the terms are recorded in a settlement agreement which is filed with the tribunal and enforceable as an order. If the complaint is not resolved, the complainant can ask the QADC to refer the complaint to the tribunal.<sup>22</sup> Until December 2009, complaints were heard by the Queensland Anti-Discrimination Tribunal (QADT), which attempted to procure a resolution through mediation as part of its case management practices.<sup>23</sup> In 2009, the QADT was amalgamated into the Queensland Civil and Administrative Tribunal (QCAT) which hears discrimination cases in its Human Rights Division.<sup>24</sup> Settlements can be registered as an order of the tribunal<sup>25</sup> unless the parties reach a private settlement. If sexual harassment is proven, the tribunal can order compensation; a public or private apology; the respondent to do something to redress the complainant's loss or damage (such as employing, promoting or reinstating the complainant); the respondent to implement programs to eliminate unlawful discrimination; the respondent not to commit further contraventions; and to void any agreements made in connection with a contravention.<sup>26</sup>

### Background to the study of settlements and remedies

This study examines how sexual harassment complaints are addressed by comparing the outcomes negotiated through compulsory ADR at each stage of the complaint resolution process to the remedies awarded at hearing. The study is based on an examination of all conciliation settlements reached at the QADC and mediation agreements reached at the QADT in 2007<sup>27</sup> resulting from complaints lodged on the basis of "sexual harassment".<sup>28</sup> Because the QADT and the QCAT decide very few cases annually, comparing settlements with court decisions on an annual basis is not very useful. To widen the scope of the study, every successful sexual harassment case the QADT heard between January 2007 and November 2009 and each that the QCAT heard between December 2009 and December 2011 was examined. As discussed below, some cases were lodged on the basis of more than one ground. Cases were counted as "successful" if sexual harassment was proved, even if other grounds were not. Where possible, only the remedy awarded for the sexual harassment is discussed.

The total number of complaints<sup>29</sup> in the study, grouped according to the different stages of the process, is presented in Table 1.

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<sup>20</sup> *Anti-Discrimination Act 1991* (Qld), s 158.

<sup>21</sup> *Anti-Discrimination Act 1991* (Qld), ss 161, 164AA.

<sup>22</sup> *Anti-Discrimination Act 1991* (Qld), s 164-164A.

<sup>23</sup> The tribunal could conduct a conference prior to hearing which was required to be held in private: see *Anti-Discrimination Act 1991* (Qld), ss 180, 183 prior to amendment by the *Queensland Civil and Administrative Tribunal (Jurisdiction Provisions) Amendment Act 2009* (Qld), Ch 9, Pt 2.

<sup>24</sup> Like its predecessor, QCAT attempts to resolve complaints prior to hearing through a compulsory conference or mediation: *Queensland Civil and Administrative Tribunal Act 2009* (Qld), ss 67, 75.

<sup>25</sup> *Anti-Discrimination Act 1991* (Qld), s 189.

<sup>26</sup> *Anti-Discrimination Act 1991* (Qld), s 209(1).

<sup>27</sup> A complaint was regarded as settled in 2007 if the tribunal registered it in 2007, even if the parties signed the agreement in 2006. The project was recorded by the Australian Catholic University's Human Research Ethics Committee (No V2009 81).

<sup>28</sup> The QADT received 127 complaints in 2007, 26 of which were about sexual harassment. Of these, eight complaints were subsequently withdrawn and three were dismissed. Of the remainder, seven were settled privately. A settlement agreed was recorded by the tribunal in the remaining eight complaints, which are considered in this study.

<sup>29</sup> The inclusive term "complaints" is used to denote complaints lodged at the QADC and QADT which resulted in a settlement agreement and cases heard by the QADT and QCAT which were successful.

**TABLE 1 Total sexual harassment complaints**

QADC conciliations (2007)	75
QADT mediations (2007)	8*
QADT (2007-2009)	5**
QCAT (2009-2011)	3***
<i>Total</i>	<i>91</i>
<p>* As discussed below, seven additional complaints at this stage were settled privately so the terms were not recorded on the complaint file.  ** The QADT heard two additional sexual harassment complaints in this timeframe but they were not proven.  *** The QCAT heard two additional sexual harassment complaints in this timeframe but they were not proven.</p>	

The following information was de-identified and collected from the settlement agreements: the grounds and areas the complaint related to; whether the complaint was lodged by one or more than one individual; whether the complaint was lodged against one or more than one respondent; whether the respondent was a public or private organisation or an individual; and the terms of settlement. This information was also extracted for the successful sexual harassment cases heard between 2007 and 2011.

Most of the complaints were lodged on more than one ground. Sixty-six of the complaints settled at the conciliation stage were lodged on an additional ground to sexual harassment. The most common grounds were sex discrimination (51 complaints) and victimisation (23 complaints). All except one of the complaints settled at the mediation stage were lodged on an additional ground to sexual harassment. The most common grounds were sex discrimination (six complaints) and victimisation (three complaints). All except one of the successful complaints heard by the tribunal were lodged on an additional ground to sexual harassment. The most common grounds were victimisation (three complaints) and various forms of vilification (three complaints).

The bulk of complaints settled at conciliation were in the area of employment. Three were in the area of goods and services and the area of eight complaints was not recorded. All of the complaints settled at mediation were in the area of employment and all except one of the successful complaints heard by the tribunal was in the area of employment. The remaining complaint related to sexual harassment and homosexual vilification between two neighbours.<sup>30</sup>

Discrimination complaints can be lodged by an individual, his/her agent, a group of individuals or a relevant entity.<sup>31</sup> All except one of the complaints settled at conciliation were lodged by an individual; the remaining complaint was lodged by three individuals. All of the complaints settled at mediation were lodged by an individual. Two of the complaints which were successful at the tribunal were lodged by two individuals; the remainder were lodged by one individual. At conciliation, 85% of complaints were lodged against more than one respondent. At mediation, 75% of complaints had multiple respondents. In 50% of the cases, there was more than one respondent.

The rest of this discussion focuses on the outcomes negotiated in sexual harassment complaints at conciliation and mediation and the orders made by the tribunal. Each outcome was counted individually and is also expressed as a percentage of the total number of settlements or successful hearings.

### Conciliation settlements

Of the 306 settlements reached through conciliation at the QADC in 2007, 75 were about sexual harassment. The outcomes negotiated are summarised in Table 2. Nine complaints were settled with only one outcome.

<sup>30</sup> *Wilson & McCollum v Lawson* [2008] QADT 27.

<sup>31</sup> *Anti-Discrimination Act 1991* (Qld), s 134.

**TABLE 2 Conciliation settlements (75)**

Compensation	56	75%
Apology/statement of regret	47	63%
Training	30	40%
Statement of service	27	36%
Respondent to act in compliance with the law in future	16	21%
Respondent to display anti-discrimination posters in the workplace	14	19%
Respondent to review its policies and procedures	13	17%
Arrangements for the relationship to go forward	7	9%
Parties not to initiate contact with one another	4	5%
Other	4	5%

Seventy-five per cent of settlements negotiated at the conciliation stage included compensation. Although the amounts ranged from \$500 to \$23,000, the average amount of compensation was only \$5,154.80 and the median was \$4,000. This is much less than Charlesworth et al's study (discussed above). Of those settlements which did not include compensation, 12 included an apology, eight included training, and 12 included outcomes which required the respondent to do something, most commonly to comply with the law in future and to display anti-discrimination posters in the workplace.

At this stage of the process, an apology is negotiated almost as often as compensation. Very few complaints include arrangements for the relationship to go forward presumably because the bulk of these complaints were made in the employment context and most relationships will have ended by the time the complaint reaches conciliation, so there is no future relationship to contemplate. In four instances, the parties agreed not to contact one another. All of these complaints were in the employment context and this outcome suggests the extreme breakdown in the parties' relationship. The four terms recorded under "other" related to individual work arrangements including payment of annual leave entitlements and reinstatement.

The data in Table 2 suggest that complainants in sexual harassment matters are concerned that other people are not subject to the same treatment as they endured. This is shown by the prevalence of outcomes that have the potential to affect other similarly situated people. Training was negotiated in 40% of settlements, and in approximately one-fifth of settlements the respondent agreed to comply with the law in future, to display information about anti-discrimination in the workplace, and to review its policies and procedures. Most of these outcomes featured in the same group of settlements, that is the same respondent was more likely to agree to more than one of these terms; they did not feature in multiple settlements.

### **Mediation settlements**

The number of settlements reduces dramatically by the mediation stage. The QADT recorded 41 settlements negotiated through mediation in 2007, eight of which were about sexual harassment. The outcomes negotiated in these complaints are summarised in Table 3.

**TABLE 3 Mediation settlements (8)**

Compensation	8
Apology/statement of regret	1
Training	-
Statement of service	-
Respondent to act in compliance with the law in future	-
Respondent to display anti-discrimination posters in the workplace	-
Respondent to review its policies and procedures	-
Arrangements for the relationship to go forward	-
Parties not to initiate contact with one another	
Other	-

All of the complaints were settled with compensation at mediation. The amount of compensation ranged from \$4,000 to \$25,000. The average was \$14,625 and the median was \$15,000. This shows that complainants receive much higher amounts of compensation if they settle at mediation than at conciliation, though it is worth noting that all except two of these complainants had legal representation<sup>32</sup> and may have had to pay their legal costs out of their compensation payment. Only one settlement included an apology. Terms which have the potential to affect people other than the complainant, such as training, reviewing policies and procedures, displaying posters in the workplace, are completely absent by the mediation stage.

### Remedies ordered by the tribunal

There were 22 successful discrimination cases decided between 2007 and 2011, eight of which were about sexual harassment. Table 4 lists the remedies available to the tribunal<sup>33</sup> and the frequency in which they were ordered during this timeframe.

**TABLE 4 Remedies ordered by the tribunal (8)**

Not to commit further contravention of the Act	0
Compensation	8 (100%)
Do something to redress the loss or damage	0
Public or private apology/retraction	1 (12%)
Implement programs to eliminate unlawful discrimination	0
Declaring void all or part of an agreement	0

Compensation was the predominant remedy ordered by the tribunal. In seven of the eight cases, compensation was the only remedy ordered. The amount of compensation ranged from \$1,240<sup>34</sup> to \$23,435.<sup>35</sup> The average amount of compensation was \$7,268.33 and the median was \$5,000. In all except two cases, the complainants had legal representation but costs were only awarded in one case.

<sup>32</sup> This information was not available for complaints settled at the conciliation stage.

<sup>33</sup> This does not include the tribunal ordering that the parties' identities are to remain confidential.

<sup>34</sup> *VM v MP, KP, K t/as DS* [2009] QADT 1. Compensation was awarded for both the sexual harassment and vilification to which the complainant was subjected.

<sup>35</sup> *KW v B G Ltd, DP & DF* [2009] QADT 7.

In this case, the respondents were also ordered to make a public apology to the complainants for the sexual harassment and sexual vilification in which they had engaged in the parties' neighbourhood over an extended period of time.<sup>36</sup> This was the only instance of an apology being ordered during this period. An apology was sought in two other cases. In the first, the respondent offered an apology during the course of the hearing so it was not necessary to order one.<sup>37</sup> In the second instance, the respondent failed to attend at either the QADC or Tribunal which Member Cullen Mandikos found showed that he did not take the proceedings seriously, so there was no point in ordering him to offer a private apology.<sup>38</sup>

## IMPROVING THE CURRENT SYSTEM

### Study findings

The data presented in this article shows that compensation is the most common way that sexual harassment complaints are being addressed, regardless of whether they are settled or decided by a tribunal.<sup>39</sup> The highest levels of compensation were negotiated at mediation. Both the average and median awards were triple the equivalent amounts at conciliation and more than double the equivalent amounts awarded by the tribunal. By contrast, the amounts negotiated at conciliation were similar to the amounts awarded by the tribunal. At first glance, this may suggest that it is more financially beneficial to settle at mediation; however, it must be taken into account that complainants are more likely to have incurred legal fees by this stage since mediation is facilitated by the tribunal. Further, the study compares a small pool of mediation settlements with a larger group of conciliation settlements and the range of compensation payments is similar at both stages, so it not possible to say with assurance that it is better for complainants to settle at mediation. What can be said with some certainty is that there is no financial benefit in pursuing a complaint to hearing especially given the legal costs involved; it is far more financially advantageous to settle beforehand.

Sexual harassment is not necessarily an isolated event between two individuals. It may be perpetrated against multiple people and it may be part of a workplace culture. It is for this reason that wider, systemic remedies are important because a payment of compensation will only remedy the individual instance of the behaviour, not its underlying causes. The data in shows that wider remedies which affect people in a similar situation to the complainant, such as fellow employees, are only likely to be negotiated at the conciliation stage. The remedies negotiated or awarded narrow very sharply at the next stages of the complaint resolution process. The only remedy other than compensation which featured at the other stages was an apology and it was negotiated only once at mediation and ordered once by the tribunal in a five-year period. This occurred even though there is no restriction on what can be negotiated at mediation and the tribunal has a range of orders at its disposal. Without interviewing the parties, mediators and tribunal members, it is not possible to state with any certainty why wider remedies do not appear at these later stages, though some assumptions can be made. First, the complainant may have legal fees to pay by the mediation and tribunal stages so compensation is the most useful remedy. Secondly, the respondent may have resisted wider remedies earlier on so the complainant may decide that there is no point in pursuing them.<sup>40</sup> Thirdly, the two ADR processes have different purposes – conciliation is conducted by members of the QADC who are experienced at resolving equal opportunity matters, so their focus is on achieving an appropriate outcome for the parties, while a tribunal mediator's focus is on keeping the matter out of court.

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<sup>36</sup> *Wilson v McCollum v Lawson* [2008] QADT 27 at [104].

<sup>37</sup> *Casey v Flanagan* [2011] QCAT 320 at [90].

<sup>38</sup> *Brosnahan v Ronoff* [2011] QCAT 439 at [33].

<sup>39</sup> Compensation was found to be the dominant remedy in other studies of sexual harassment and discrimination complaints: see Charlesworth et al n 16; Charlesworth S, "Claiming Discrimination: Complaints of Sex and Gender Discrimination in Employment under the Victorian Equal Opportunity Act 1995", Working Paper Series 2008 No 1, Centre for Applied Social Research, RMIT University (2008) p 17; Chapman A and Mason G, "Women, Sexual Preference and Discrimination Law: A Case Study of the NSW Jurisdiction" (1999) 21 *Sydney Law Review* 525; Allen D, "Remedying Discrimination: The Limits of the Law and the Need for a Systemic Approach" (2010) 29(1) *University of Tasmania Law Review* 87.

<sup>40</sup> See generally Allen, n 4 at 790ff.

### **Increasing the flow of information**

The fact that wider outcomes are only being achieved through conciliation conducted by the equal opportunity agency provides a very strong reason for being in favour of using ADR in this jurisdiction, in addition to the advantages identified above. However, this additional benefit might not outweigh the problems with ADR and settlement, notably that settlement has no effect on the law's development, nor does it have a deterrent or educative effect.<sup>41</sup> However, a simple change in practice would improve the law's effectiveness while maintaining any benefits of ADR and settlement – requiring the equal opportunity commissions to publish de-identified data annually about the complaints they accept.<sup>42</sup> The data would be of the kind presented in this article and in Charlesworth et al's study, namely data about nature of the complaints, the parties, the industry in which the complaint arose, when the complaint was settled and the settlement outcomes. Releasing this type of information would assist complainants to decide whether to lodge a complaint because they would know what other sexual harassment matters were settled for and the type of outcomes they could seek without the need for legal advice. It would also provide the equal opportunity commissions with information for educating the community about the prevalence of sexual harassment and how it is being addressed; plus, employers could use the information to educate their employees about the risks and potential consequences, personal and otherwise, of sexual harassment. Lastly, it would remind the community that sexual harassment still exists but something is being done to address it.

### **CONCLUSION**

Statistics show that sexual harassment still exists and people continue to lodge complaints about it, though the majority are resolved through a confidential process rather than a court hearing. Due to the privatised nature of the process, it is difficult to say whether the law is achieving its goal of eradicating sexual harassment. Certainly a repeated criticism of the use of ADR and settlement in this jurisdiction is that the law can have little effect on changing behaviours. However, the data presented in this study shows that wider outcomes are being negotiated through ADR and not through the courts. This is a strong reason to support the continued use of ADR to address sexual harassment. Increasing the flow of information about how sexual harassment complaints are being addressed would increase the law's effectiveness in eradicating sexual harassment while maintaining the benefits of ADR.

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<sup>41</sup> This is compounded by the fact that equal opportunity commissions do not play a role in enforcing laws prohibiting sexual harassment. It is beyond the scope of this article to consider how enforcement could be improved but elsewhere the author has argued that the commissions should be able to provide financial assistance to complainants on the condition that wider outcomes are included in any resulting settlement: Allen D, "Strategic Enforcement of Anti-Discrimination Law: A New Role for Australia's Equality Commissions" (2011) 36(3) *Monash University Law Review* 103.

<sup>42</sup> Although this article does not consider the practice of ADR, the author has argued elsewhere that the process of conciliation could be improved by introducing a rights-based approach: Allen, n 14 at 204ff.

# STRATEGIC ENFORCEMENT OF ANTI-DISCRIMINATION LAW: A NEW ROLE FOR AUSTRALIA'S EQUALITY COMMISSIONS

DOMINIQUE ALLEN\*

*In Australia, anti-discrimination law is enforced by individuals who lodge a discrimination complaint at a statutory equality commission. The equality commission is responsible for handling complaints and attempting to resolve them. In most instances, the equality commission cannot advise or assist the complainant; it must remain neutral. In other countries, the equality commission plays a role in enforcement, principally by providing complainants with assistance to resolve their complaint including funding litigation. The equality commission's assistance function has been most effective when used strategically as part of a broader enforcement program, rather than on an ad hoc basis. This article discusses equality commission enforcement in the United States of America, Britain, Northern Ireland and Ireland and shows how the equality commissions in those countries have engaged in strategic enforcement in order to develop the law and secure remedies which benefit the wider community, not only the individual complainant. Based on their experience, it is argued that the Australian equality commissions should play a role in enforcement so that they can tackle discrimination more effectively.*

## I INTRODUCTION

In Australia, anti-discrimination law is constructed around an individual complaints-based model. The law is enforced by individual victims of discrimination who lodge complaints at the statutory equality commission<sup>1</sup> in their jurisdiction or at the Australian Human Rights Commission ('AHRC'). The

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1 The agencies created by anti-discrimination statutes not only vary in functions and responsibilities, they are also identified differently. The statutory agency is usually an Anti-Discrimination or Equal Opportunity Commission, Authority or Board. The federal agency and those in the Australian Capital Territory and Victoria have additional responsibilities for human rights and this is identified in their title. Similarly, the overseas agencies are identified in a variety of ways. For ease of reference, particularly to the overseas agencies, 'equality commission' is used throughout when referring to the agency in general terms. It may be argued that this is not the most accurate descriptor of the Australian agencies at present considering that the bulk of their workload is handling discrimination complaints. Given that the premise of this article is that the agency's role in tackling discrimination and inequality would be strengthened if it played a role in enforcement, 'equality' was selected in preference to 'equal opportunity' or 'anti-discrimination' commission.

role of the equality commission is to receive the complaint, investigate it and ascertain whether it comes within its jurisdiction and, if so, attempt to resolve it using Alternative Dispute Resolution ('ADR'). If it cannot be resolved, the complainant can ask the equality commission to refer the complaint to court for adjudication.

The premise of this article is that discrimination will not be tackled effectively in Australia until the equality commissions play a role in enforcing the law. This article examines one means of enforcement — assisting complainants to resolve their complaint. As Part II shows, the Australian equality commissions are primarily concerned with handling and resolving complaints. Two can assist complainants, but that is the exception, not the norm. This is contrasted with the equality commissions in the United States, Britain, Northern Ireland and Ireland. In these countries, the equality commissions can assist complainants, which includes providing informed advice about the merits of their complaint, arranging legal representation and funding litigation. Examples of how these equality commissions have used their assistance function are presented in Part III to show that by using this mechanism strategically, the equality commissions have developed the law and obtained remedies that extend beyond the individual complainant. Assistance is part of a broader strategy of enforcing the law, so it is used in conjunction with lobbying, education and communication. Based on the experience of the overseas equality commissions, Part IV proposes five reasons why it would be valuable for the Australian equality commissions to engage in assistance work. Essentially, the benefits of this function are that it would enable the equality commission to take a strategic approach to developing the jurisprudence and maintaining the law's profile. This would filter down and affect both the informal complaint resolution process and future cases. One of the equality commission's functions is to promote voluntary compliance and it is argued that this 'carrot' would be more effective if it was accompanied by the 'stick' of litigation from an experienced 'repeat player'.

**Table 1: Equality Commissions**

Equality Commission	Jurisdiction	Acronym
Australian Human Rights Commission	Australia	AHRC
Equal Employment Opportunity Commission	United States of America	USEEOC
Equality and Human Rights Commission	Britain	UKEHRC
Commission for Racial Equality	Britain	UKCRE
Equal Opportunities Commission	Britain	UKEOC
Disability Rights Commission	Britain	UKDRC
Equality Commission for Northern Ireland	Northern Ireland	ECNI
Equality Authority	Ireland	IEA



## II THE EQUALITY COMMISSION AND ENFORCEMENT

Violations of anti-discrimination laws are civil wrongs, somewhat like torts, for which victims have the right to seek redress. Enforcement is achieved through what Dickens terms a 'two-pronged approach'<sup>2</sup> — individual complaints and equality commission enforcement. Part II shows that in Australia, the law is primarily enforced through individual complaints. This is contrasted with the position in the United States, Britain, Northern Ireland and Ireland which also permit equality commission enforcement. Having established that the primary means of enforcement by the overseas equality commissions is by providing assistance to individual complainants, Part II concludes by highlighting the importance of taking a strategic approach to this activity. In this context, 'enforcement' refers to compliance with the law, primarily the non-discrimination principle, rather than the enforcement of a court judgment.<sup>3</sup> Enforcement is also distinguished from 'complaint handling', which is the process of receiving and investigating a discrimination complaint. As this section explains, some equality commissions are only responsible for enforcement; others are also responsible for complaint handling.

### A Australia

#### 1 Individual Complaints

In Australia, anti-discrimination law is enforced through individual complaints in much the same way across the country: an equality commission acts as a 'gatekeeper' for complaints meaning that the equality commission must have the opportunity to resolve the complaint informally before the complainant can litigate.<sup>4</sup> To fulfil this function, once the equality commission receives the complaint, it conducts an investigation in order to determine whether or not to accept the complaint. If it accepts the complaint, the equality commission will attempt to resolve it using ADR, usually conciliation. The equality commission does not make a decision on the merits; its role is to facilitate complaint resolution as a third party. If the complaint is not resolved, the complainant may decide to litigate. Most of the equality commissions' work centres on receiving and resolving complaints, although the equality commissions in Queensland, New South Wales and Western Australia can appear as an *amicus curiae*<sup>5</sup> and so can

2 Linda Dickens, 'The Road is Long: Thirty Years of Equality Legislation in Britain' (2007) 45 *British Journal of Industrial Relations* 463, 474 et seq.

3 On enforcement in the anti-discrimination context, see Martin MacEwen (ed), *Anti-Discrimination Law Enforcement: A Comparative Perspective* (Avebury, 1997).

4 From August 2011, complainants in Victoria will have the option of proceeding directly to court: see *Equal Opportunity Act 2010* (Vic).

5 *Anti-Discrimination Act 1991* (Qld) s 186; *Anti-Discrimination Act 1977* (NSW) s 99; *Equal Opportunity Act 1984* (WA) s 113.

AHRC Commissioners.<sup>6</sup> Some State and Territory equality commissions<sup>7</sup> and the AHRC<sup>8</sup> can intervene in proceedings with leave of the court.

## 2 Assisting Individual Complainants

The majority of Australian equality commissions cannot assist individual complainants or fund litigation. The exceptions are the AHRC and the South Australian and Western Australian Equal Opportunity Commissions. The AHRC's assistance is limited and it is not financial. The AHRC can only assist a complainant with preparing the court forms to commence proceedings in the Federal Court.<sup>9</sup> Another option for complainants and respondents in federal matters is to apply to the Commonwealth Attorney-General for legal or financial assistance with court proceedings on the basis of hardship.<sup>10</sup> Since 2000, the Attorney-General has received 27 applications for financial assistance on that basis and has only approved nine grants of assistance.<sup>11</sup>

Until 2009, the *Equal Opportunity Act 1984* (SA) stated that the Commissioner *must* assist a complainant with presenting their complaint before the tribunal if requested.<sup>12</sup> In a review of the State's anti-discrimination legislation the government said this creates a conflict because the Commission must handle the complaint impartially, yet it is required to represent the complainant.<sup>13</sup> The review proposed repealing the requirement to assist the complainant and appointing an independent solicitor for that purpose.<sup>14</sup> This proposal was not implemented. Instead, the law was amended to state that the Commissioner *may provide representation* for the complainant *or respondent* with presenting their complaint before the tribunal if requested.<sup>15</sup> To date, the Commissioner has not received any requests for such assistance.<sup>16</sup>

6 *Australian Human Rights Commission Act 1986* (Cth) s 46PV.

7 Namely, the equality commissions in Queensland, Tasmania and the Northern Territory: *Anti-Discrimination Act 1991* (Qld) s 235(j); *Anti-Discrimination Act 1998* (Tas) s 7(b); *Anti-Discrimination Act* (NT) s13(q). From August 2011, the Victorian commission will also have the power to intervene and appear as amicus: *Equal Opportunity Act 2010* (Vic) ss 159, 160.

8 *Australian Human Rights Commission Act 1986* (Cth) s 11(1)(o); *Sex Discrimination Act 1984* (Cth) s 48(1)(gb).

9 *Australian Human Rights Commission Act 1986* (Cth) s 46PT.

10 *Ibid* s 46PU.

11 Nine applicants did not proceed with their application and nine did not meet the eligibility criteria in *Australian Human Rights Commission Act 1986* (Cth) s 46PU(2). Applications are treated in confidence by the Attorneys-General, thus further information about the type of complaint or the applicant is not available: Email from Terina Koch, Principal Legal Officer, Financial Assistance Division, Social Inclusion Division, Attorney-General's Department to Dominique Allen, 9 August 2010.

12 *Equal Opportunity Act 1984* (SA) s 95(9), as repealed by *Equal Opportunity (Miscellaneous) Amendment Act 2009* (SA).

13 South Australian Government, 'Review of South Australian Equal Opportunity Legislation' (Framework Paper, 2003) 41. The Opposition also recognised this problem: see South Australia, *Parliamentary Debates*, House of Assembly, 3 June 2009, 3020 (Isobel Redmond, Shadow Attorney-General).

14 South Australian Government, above n 13, 40.

15 *Equal Opportunity Act 1984* (SA) s 95C.

16 Email from Katherine O'Neill, Acting Deputy Commissioner, South Australian Equal Opportunity Commission to Dominique Allen, 13 April 2010.

The assistance provided by the Western Australian Equal Opportunity Commission is an anomaly in the Australian context. The *Equal Opportunity Act 1984* (WA) permits the Commissioner to arrange legal representation or funding for the complainant to appear in the Supreme Court.<sup>17</sup> The Commission is also required to provide the complainant with legal assistance if the Commissioner refers their complaint to the State Administrative Tribunal.<sup>18</sup> The Act does not specify the type of assistance the Commission must provide. In practice, the Commission's Legal Officers provide legal representation and their workload is supplemented by pro bono work conducted by private law firms under an arrangement with the Commission.<sup>19</sup> Assistance typically involves providing an assessment of the case, including the merits, representing the complainant at a directions hearing, and preparing pleadings and documents for discovery. If mediation at the Tribunal is not successful and the complainant has an arguable chance of success, the Commission's assistance may extend to a full hearing.<sup>20</sup> During the 2008–09 financial year, the Commissioner referred 42 complaints to the Tribunal.<sup>21</sup> Almost 60 per cent settled or were withdrawn before hearing.<sup>22</sup> Therefore, most of the assistance provided by the Commission is at the pre-litigation stage.

### 3 Fair Work Ombudsman

On 1 July 2009, the anti-discrimination framework was altered by the commencement of the *Fair Work Act 2009* (Cth). The Act prohibits employment discrimination across a range of attributes.<sup>23</sup> It is enforced by the Fair Work Ombudsman ('FWO') which has a wide range of powers including carrying out investigations, issuing compliance notices and conducting litigation.<sup>24</sup> The Act establishes a stronger enforcement model for addressing employment discrimination than traditional anti-discrimination laws, so undoubtedly it will change the anti-discrimination landscape. The discussion in this article focuses on the equality commissions because, as the sole regulators of anti-discrimination law for over three decades, there is considerable evidence about their operation, whereas the FWO is too new to evaluate effectively. Further, limiting the discussion facilitates the comparison with the overseas equality commissions.

17 *Equal Opportunity Act 1984* (WA) s 93A(1).

18 *Ibid* s 93.

19 Western Australian Equal Opportunity Commission, *Annual Report 2006–2007* (2007) 3.

20 Email from Jeff Rosales-Castaneda, Legal Officer, Western Australian Equality Opportunity Commission to Dominique Allen, 22 July 2008.

21 Western Australian Equal Opportunity Commission, *Annual Report 2008–2009* (2009) 43.

22 Thirty seven assisted complaints were carried over from previous years and there were 4 appeals and exemption applications, totalling 83 assisted complaints. 64 of those 83 matters were finalised: *ibid* 43–4, Tables 18, 19.

23 *Fair Work Act 2009* (Cth) s 351.

24 *Ibid* ss 706–17. See also Bill Loizides, 'FWO Discrimination Policy' (Guidance Note No 6, Australian Government FWO, 17 December 2009) <<http://www.fairwork.gov.au/guidancenotes/GN-6-FWO-Discrimination-Policy.pdf>>.

## B The United States, Britain, Northern Ireland and Ireland

The enforcement of anti-discrimination law in the other countries examined in this article utilises both of Dickens' 'prongs' — individual complaints and equality commission enforcement.<sup>25</sup> Enforcement by the equality commission primarily involves assisting individuals to resolve their complaint. Although the equality commissions are empowered to conduct investigations into discrimination, principally into instances which appear to be widespread or of a systemic nature,<sup>26</sup> for differing reasons the equality commissions have found it difficult to conduct investigations, particularly in the United States<sup>27</sup> and Britain.<sup>28</sup> Consequently, the equality commissions focused their resources on assisting individual complaints and conducting litigation. For this reason, investigations are not examined further in this article.<sup>29</sup>

This section presents an overview of both the complaint resolution process and the equality commissions' assistance function in the United States, Britain, Northern Ireland and Ireland. In addition to this function, the equality commissions can

25 See above n 2.

26 *Equal Employment Opportunity Act of 1972*, 42 USC §2000e-5(b) (2000); *Sex Discrimination Act 1975* (UK) ('SDA(UK)') c 65, ss 57, 58, 67; *Race Relations Act 1976* (UK) ('RRA(UK)') c 74, ss 48, 49, 58; *Disability Rights Commission Act 1999* (UK) ('DRCA') c 17, ss 3–5; *Equality Act 2006* (UK) c 3, s 20(2); *Employment Equality Act 1998* (Ireland) Number 21/1998, ss 62–5.

27 The USEEOC Commissioners can institute a Commissioner Charge of discrimination based on the Commission's knowledge of inequality at a workplace obtained from individual complaints. The USEEOC then investigates the charge and if the investigation uncovers enough evidence to suggest that discrimination is occurring, the Commissioner can bring suit. Initially, the USEEOC used Commissioner Charges to investigate companies thought to be engaging in systemic race discrimination. Some of the country's largest employers were investigated, namely Ford Motor Company, General Electric, General Motors and Sears, Roebuck & Co. However, due to its complaint handling responsibilities, which consumes most of its resources, the USEEOC has found it difficult to engage in enforcement activities. See further David L. Rose, 'Twenty-Five Years Later: Where Do We Stand on Equal Employment Opportunity Law Enforcement?' (1989) 42 *Vanderbilt Law Review* 1121, 1151 n 159. See also Julie Chi-hye Suk, 'Antidiscrimination Law in the Administrative State' [2006] *University of Illinois Law Review* 405, 440–4, 468.

28 When it established the UKCRE and UKEOC, Parliament expected them to act, and to be seen to be acting, as law enforcement agencies. Investigations were expected to be the equality commissions' main enforcement method. However, a series of judicial decisions subsequently scaled back their effectiveness and introduced cumbersome administrative procedures. Most famously, Lord Denning likened inquiries to the Inquisition: *Science Research Council v Nasse* [1979] 1 QB 144, 170. See also *R v CRE*; *Ex parte London Borough of Hillingdon* [1982] 3 WLR 159; *UKCRE v Amari Plastics* [1982] 2 WLR 972; *Re Prestige Group plc* [1984] 1 WLR 335. See also Catherine Barnard, 'A European Litigation Strategy: The Case of the Equal Opportunities Commission' in Jo Shaw and Gillian More (eds), *New Legal Dynamics of European Union* (Clarendon Press, 1995) 258; Colm O'Connell, 'The Commission for Equality and Human Rights: A New Institution for New and Uncertain Times' (2007) 36 *Industrial Law Journal* 141; George Appleby and Evelyn Ellis, 'Formal Investigations: The Commission for Racial Equality and the Equal Opportunities Commission as Law Enforcement Agencies' [1984] *Public Law* 236.

29 On investigations conducted by the British equality commissions, see, eg, Appleby and Ellis, above n 28; Alison Harvison Young, 'Keeping the Courts at Bay: The Canadian Human Rights Commission and its Counterparts in Britain and Northern Ireland: Some Comparative Lessons' (1993) 43 *University of Toronto Law Journal* 65, 95–125; O'Connell, 'The Commission for Equality and Human Rights', above n 28, 148–9; Chi-hye Suk, above n 27, 444 et seq; Aileen McColgan, *Discrimination Law: Text, Cases and Materials* (Hart, 2<sup>nd</sup> ed, 2005) 357; Rupert Harwood, 'Teeth and Their Use: Enforcement Action by the Three Equality Commissions' (Report, Public Interest Research Unit, 2006).

appear as an *amicus curiae* or intervene in proceedings. These powers relate to the litigation stage and are not considered in detail in this article as the focus is on broader issues. It is acknowledged that the equality commissions could use their *amicus curiae* and intervention powers to accomplish some of the activities discussed in Part IV, such as developing the law. The experience of the overseas equality commissions shows that the *amicus curiae* and intervention powers are most effective when they are exercised as part of a program of strategic enforcement. However, it may be harder for the equality commission to achieve its strategic objectives this way because in a case in which it is a third party, the equality commission will have less control compared to when it assists the complainant. The equality issues may be peripheral to the matter, for example, or the equality commission may be required to frame its arguments around the issues raised by the parties.

## 1 Individual Complaints

In Ireland, discrimination complaints are lodged at the Equality Tribunal which resolves them through mediation or adjudication. The Equality Authority ('IEA') is not responsible for handling or resolving complaints. There are two equality commissions in the United Kingdom: the Equality and Human Rights Commission ('UKEHRC') in Britain and the Equality Commission for Northern Ireland ('ECNI'). The complaint resolution process is substantially the same. Complainants have direct access to Employment Tribunals and to civil courts for non-employment related complaints. The equality commissions are not responsible for complaint handling or conciliation.<sup>30</sup> In October 2007, the three British equality commissions — the Commission for Racial Equality ('UKCRE'), the Equal Opportunities Commission ('UKEOC') and the Disability Rights Commission ('UKDRC') — were merged into one body, the UKEHRC, which is responsible for all prohibited forms of discrimination. The discussion of Britain herein refers predominantly to the UKEHRC's predecessors and although it is historical, the information is still valuable because neither the role of the equality commission or the enforcement model were radically altered in 2007; the primary change was that the three existing equality commissions were amalgamated into the UKEHRC, and it assumed additional responsibility for human rights.<sup>31</sup> The former equality commissions had up to four decades experience and each used the law and their enforcement functions in different ways with varying degrees

30 Parties can choose conciliation for an employment related complaint. Conciliation is conducted by a government agency — the Advisory Conciliation and Arbitration Service ('ACAS') in Britain and the Labour Relations Agency in Northern Ireland. See generally Keith Susson and John Taylor, 'The Advisory, Conciliation and Arbitration Service' in Linda Dickens and Alan C. Neal (eds), *The Changing Institutional Face of British Employment Relations* (Kluwer Law, 2006) 25, 29. Complainants in a non-employment disability discrimination complaint could access an independent conciliation service between 2000–07: see below n 69. In September 2007, the ECNI established a similar conciliation service for Northern Ireland: see *Equality (Disability Etc)(Northern Ireland) Order 2000* (NI) SR 2000/1110 art 12. The UKEHRC now provides a voluntary conciliation service.

31 The UKEHRC has a wider range of enforcement powers at its disposal, such as compliance notices and an inquiry function. Thus, it has engaged in a different range of activities than its predecessors. It is outside the scope of this article to consider these activities further.

of success, as discussed throughout the article. Interviews were conducted with key staff at the UKCRE and UKDRC immediately prior to the merger to gain an insight into how the equality commissions used their enforcement functions and to determine the value of introducing such an approach in Australia.

The Equal Employment Opportunity Commission ('USEEOC') is the federal agency responsible for investigating complaints about employment discrimination in the United States.<sup>32</sup> Like the Australian equality commissions, the USEEOC is a gatekeeper, so before a complainant can file a lawsuit in federal court they must file a 'charge' (a complaint) with the USEEOC. The role of the USEEOC is to investigate each charge. The Commission operates as a neutral fact-finder. If it finds that there is reasonable cause that discrimination has occurred, the USEEOC attempts to resolve the charge by conference, conciliation or persuasion.<sup>33</sup> If the parties cannot reach agreement, the complainant can litigate.<sup>34</sup>

## 2 Assisting Individual Complainants

The equality commissions in the United Kingdom and Ireland can assist complainants with resolving their complaints.<sup>35</sup> A complainant can contact the equality commission and, provided they meet certain criteria, the equality commission may decide to assist them. For instance, under the *Race Relations Act 1976* (UK) ('RRA(UK)') 'assistance' includes offering advice, trying to procure a settlement, arranging for advice from a solicitor, and arranging legal representation.<sup>36</sup> Since they do not play a part in complaint resolution, the United Kingdom and Irish equality commissions can assist complainants from the beginning of the process.

The situation in the United States is different. Since it is a gatekeeper, the USEEOC cannot litigate a charge on behalf of a complainant until it has attempted to resolve the charge informally.<sup>37</sup> If the parties cannot reach an agreement through ADR, the complainant can litigate, or the USEEOC may decide to litigate the

32 The USEEOC enforces: Title VII of the *Civil Rights Act of 1964*, 42 USC §2000e (1964); *Age Discrimination in Employment Act of 1967*, 29 USC §633a (1967); Titles I and V of the *Americans with Disabilities Act of 1990* 42 USC §§ 12101 (1990). Other federal institutions are responsible for non-employment based discrimination. For example, the Civil Rights Division of the Department of Justice is responsible for enforcing Title III of the *Americans with Disabilities Act* which prohibits discrimination on the basis of disability in public accommodation. Most states also have laws prohibiting discrimination and a civil rights division within the executive to enforce these laws. See generally Lisa Guerin and Amy DelPo, *The Essential Guide to Federal Employment Laws* (NoLo, 2009).

33 *Civil Rights Act of 1964*, 42 USC §2000e-5 (1964).

34 See Jean R Sternlight, 'In Search of the Best Procedure for Enforcing Employment Discrimination Laws: A Comparative Analysis' (2004) 78 *Tulane Law Review* 1401, 1402-3.

35 SDA(UK) s 75(1); RRA(UK) s 66 (the UKCRE also partly funded a network of more than 80 local Race Equality Councils that could advise and assist race discrimination complainants); DRCA s 12; *Race Relations (Northern Ireland) Order 1997* (NI) SR 1997/869 art 64(7); *Sex Discrimination (Northern Ireland) Order 1976* (UK) art 75; *Equality (Disability Etc) (Northern Ireland) Order 2000* (NI) SR 2000/1110 art 9; *Employment Equality Act 1998* (Ireland) Number 21/1998 s 67. The UKEHRC can also provide assistance: *Equality Act 2006* (UK) c 3, s 28.

36 RRA(UK) s 66(2).

37 *Civil Rights Act of 1964*, 42 USC §2000e-5(f)(1) (1964).

charge on the complainant's behalf. Therefore, the USEEOC's assistance function applies only if ADR is unsuccessful and the complainant decides to litigate. The USEEOC can also litigate if the complainant settles the charge; because it acts in the public interest, it can bring an action which will benefit other people.<sup>38</sup> Unlike the United Kingdom and Irish equality commissions, the USEEOC can assist a group of complainants.<sup>39</sup>

### C Modifying the Australian Approach

The overseas equality commissions considered in this article that have used their assistance function most successfully do not play a role in complaint handling or provide ADR.<sup>40</sup> Without the responsibility for complaint handling or providing ADR, an equality commission can focus on enforcing the law, including through assisting complainants. Therefore, so that the Australian equality commissions can act as an advocate for the victims of discrimination, they should be divested of their complaint handling and conciliation functions. Either a separate agency<sup>41</sup> or the court<sup>42</sup> would assume these functions, thereby enabling the equality commissions to focus on strategic enforcement, including through assisting complainants. According to Hepple, this is why complaint handling was taken away from the British Race Relations Board (the UKCRE's predecessor); so that the Board could take a broader, strategic approach to addressing discrimination, it was freed from resolving individual complaints.<sup>43</sup>

Of course, it is possible simply to separate the equality commission's complaint handling arm from its enforcement arm, which is the model used in the United States. Likewise, the equality commissions in Western Australia and South Australia currently have separate enforcement arms. However, these three equality commissions have used their assistance function to limited extent, especially in comparison to the overseas equality commissions that do not handle complaints, as the remainder of this article shows. This suggests that there is a causal link between an equality commission possessing complaint handling and enforcement

38 *EEOC v Waffle House Inc*, 534 US 279, 286 (2002).

39 If a charge is not resolved and it relates to 20 complainants or less, the field office's legal section will review it to determine whether it is a charge that is suitable for it to litigate using staff trial attorneys. For charges with a class of more than 20 harmed parties, the Commission must vote on whether or not to litigate: Interview with Lisa Sirkin, Supervisory Trial Attorney, Equal Employment Opportunity Commission (New York City, 12 September 2007). An example is the Restaurant Daniel litigation, discussed in Part III.

40 Compare the work of the UKDRC and ECNI with the USEEOC, for instance, as discussed in Part III. On the USEEOC, see below n 59.

41 For example, in Britain, ACAS is responsible for the voluntary conciliation of employment related discrimination complaints.

42 For example, in Ireland, the Equality Tribunal offers complainants a choice of mediation or adjudication to resolve their complaint. In the industrial relations jurisdiction in Australia, the enforcement agency is not responsible for ADR or adjudication.

43 Bob Hepple, 'The Equality Commissions and the Future Commission for Equality and Human Rights' in Linda Dickens and Alan C Neal (eds), *The Changing Institutional Face of British Employment Relations* (Kluwer Law, 2006) 101, 106. See also Christopher McCrudden, David J Smith and Colin Brown, *Racial Justice at Work* (Policies Study Institute, 1991) 15.

functions, and it using the latter to a limited extent. One explanation for this is the resources consumed by complaint handling. During its existence, complaint handling has consumed most of the USEEOC's resources, leaving insufficient funds for enforcement.<sup>44</sup> A more persuasive explanation is the conflict of interest in the equality commission taking a neutral position during the complaint handling and complaint resolution phases, and then playing an advocacy role once it decides to assist the complainant.<sup>45</sup> This is not so much of a problem in the United States because the USEEOC does not assist the complainant until the complainant decides to litigate, by which time the Commission's role as a neutral facilitator has ended. In the United Kingdom and Ireland, assistance is available once the complainant decides to lodge a complaint. This is the model recommended for Australia. It would be impractical for a member of staff to advise and assist the complainant, while another served as the Conciliator and attempted to resolve the complaint. Therefore, separating the functions within the same institution is not the preferred option. If the equality commission is not responsible for handling or conciliating complaints, there will be no expectation that it will behave neutrally. It can then assume an enforcement role without any conflict of interest.

The remaining discussion concentrates on the assistance work conducted by the overseas equality commissions and argues that it is important to take a strategic approach to enforcement. Complainant assistance is an activity that most Australian legislatures have not contemplated to date. Since it is the key component of the overseas equality commissions' enforcement work, it is worth examining in-depth, particularly in light of the Commonwealth government's current review of federal anti-discrimination legislation.<sup>46</sup>

### **D Providing Assistance – Why Take A Strategic Approach**

The primary manner in which the overseas equality commissions enforce anti-discrimination law is by assisting complainants to resolve their discrimination complaint. The extent of the assistance provided depends on the circumstances of the case and the funding available. For example, the IEA grants assistance in stages, and reviews the level of assistance as the complaint progresses. Initially, complainants assisted by the IEA only receive advice and help with lodging their complaint at the Equality Tribunal. If the IEA determines that the case is worth pursuing, it will grant further assistance to represent the complainant at the Tribunal.<sup>47</sup> The likelihood of success at hearing is part of this assessment. The IEA also considers the cost of proceedings, the backlog of cases, the resources available to the Authority and what the Tribunal is likely to order.<sup>48</sup>

44 See below n 59.

45 See South Australian Government, above n 13.

46 Robert McClelland, Attorney-General and Lindsay Tanner, Minister for Finance and Deregulation, 'Reform of Anti-Discrimination Legislation' (Media Release, 21 April 2010).

47 Interview with Carol Anne Woulfe, Solicitor, Equality Authority (Dublin, 26 September 2007). See also IEA, *Annual Report 2006 (2007)* Appendix 5.

48 IEA, *Annual Report*, above n 47. See also IEA, *Current Criteria for Section 67 Representation* <<http://www.equality.ie/index.asp?locID=14&docID=9>>.



The equality commissions initially assisted complainants on an ad hoc basis. There are two main criticisms levelled at this type of approach: firstly, happening upon a landmark case is a matter of chance; and secondly, the equality commission can be consumed by such work and lose focus on wider objectives. After examining these criticisms, this section shows that they can be overcome by taking a strategic approach. It draws on the experience of the UKDRC, which successfully introduced a program of strategic enforcement of disability discrimination law.

## 1 Criticisms of Providing Assistance on an Ad Hoc Basis

The first criticism is that assistance on an ad hoc basis can end up being a lottery. Colm O'Conneide, Lecturer at the Faculty of Laws, University College London, described this as a search for 'a needle in a haystack'.<sup>49</sup> By assisting complainants on an ad hoc basis, the equality commission must frame its strategy around the type of complaints brought to it. It is also unlikely that the equality commission will happen upon a landmark case using an ad hoc approach.

The second criticism of assistance work is that it can easily become the equality commission's main work, its 'bread and butter'.<sup>50</sup> The basis of this criticism is that focusing on assisting complainants on an ad hoc basis can stretch the equality commission's resources and cause it to lose focus on its wider objectives,<sup>51</sup> such as its educational, promotional and policy work.<sup>52</sup> To minimise this problem, the UKCRE and USEEOC implemented a strategy of providing assistance to obtain the maximum benefit from their resources. In its early days, the UKCRE attempted to assist everyone who had an arguable case<sup>53</sup> but from 2003, it required more than 'arguability' to provide assistance.<sup>54</sup> The UKCRE changed its focus to cases that would clarify the law, affect a group or promote legislative change.<sup>55</sup> The Commission regarded this approach as a more valuable use of its limited resources.<sup>56</sup> Congress invested the USEEOC with the power to litigate on behalf of complainants in 1972.<sup>57</sup> In doing this, the US Supreme Court said, Congress expected the USEEOC to bear 'the primary burden of litigation'.<sup>58</sup> However, during its lifetime, the USEEOC has been preoccupied with its

49 Interview with Colm O'Conneide, Lecturer, University College London (London, 15 September 2007).

50 O'Conneide, 'The Commission for Equality and Human Rights', above n 28, 150.

51 The British government was concerned that this would happen to the UKEOC. See quotes from its White Paper which preceded the introduction of the SDA(UK) and UKEOC, cited in Nick O'Brien, 'The GB Disability Rights Commission and Strategic Law Enforcement: Transcending the Common Law Mind' in Anna Lawson and Caroline Gooding (eds), *Disability Rights in Europe* (Hart, 2005) 249, 250.

52 Ibid. See, for example, the variety of such work undertaken by the UKDRC in addition to assisting complainants.

53 Hepple, above n 43, 110.

54 UKCRE, *2003 Annual Report* (2004) 19.

55 Ibid.

56 The UKCRE took on responsibility for the race equality duty at this time and part of its strategy was to test it. Its new Chair, Trevor Phillips, also preferred to concentrate resources on 'softer' approaches, such as developing codes of practice for industry and implementing the race equality duty: Hepple, above n 43, 110.

57 *Equal Employment Opportunity Act of 1972*, Pub L No 96-261, 86 Stat 103.

58 *General Telephone Co of The Northwest v EEOC* 446 US 318, 326 (1980).

complaint handling responsibilities. Due to the resources this consumes, the USEEOC has been criticised for not being an enforcement agency.<sup>59</sup> To address this, in 1996 it adopted a vision of strategic enforcement by implementing its National Enforcement Plan.<sup>60</sup> The Plan introduced a strategy for the USEEOC's enforcement role and defined criteria for selecting which charges to litigate.<sup>61</sup> The purpose of this Plan is to ensure the most effective use of the USEEOC's resources by directing funds to where they have the potential to yield the greatest results.<sup>62</sup> The USEEOC's enforcement priorities apply across its work, including its power to act as an *amicus curiae*.

## 2 The Benefits of Taking a Strategic Approach

An equality commission has limited resources. It is not possible for it to assist every meritorious case, so a certain degree of filtering is required anyway. However, rather than assisting complainants on an ad hoc basis, the equality commission can develop a strategy behind the assistance it provides. There should be a reason for the equality commission to select certain complaints rather than, in Nick O'Brien's words, get 'every drop of justice from the orange'.<sup>63</sup>

The UKDRC offers an example of successfully using what is termed 'strategic enforcement'.<sup>64</sup> As the 'youngest' of the British equality commissions, the UKDRC benefited from assessing the successes and failures of the older commissions and

59 The USEEOC has experienced large backlogs of charges, which was a record high of more than 100 000 charges in 1995. For this reason it has been criticised for becoming a charge-handling agency rather than an enforcement one; Green contends that this is due also to the political nature both of the agency and of its funding: Michael Z Green, 'Proposing a New Paradigm for EEOC Enforcement After 35 years: Outsourcing Charge Processing by Mandatory Mediation' (2001) 105 *Dickinson Law Review* 305, 309–10. See also Chi-hye Suk, above n 27, 468. Funding cuts have limited the USEEOC's enforcement activities and forced it to focus on charge processing, something the USEEOC has also acknowledged: see USEEOC, *US Equal Opportunity Commission National Enforcement Plan* (1997) <<http://www.eeoc.gov/eeoc/plan/nep.cfm>>.

60 USEEOC, *US Equal Opportunity*, above n 59. It also implemented the Priority Charge Handling Procedure in 1995 to address the backlog of charges. See generally USEEOC Office of the General Counsel, 'Introduction to Commission Policies' in *Regional Attorney's Manual* (April 2005) <<http://www.eeoc.gov/eeoc/litigation/manual/>>; Paul M Igasaki and Paul Steven Miller, *Priority Charge Handling Task Force Litigation Task Force* (Report, USEEOC, 1998) VI; Theodore J St Antoine, 'Mandatory Arbitration of Employee Discrimination Claims: Unmitigated Evil or Blessing in Disguise?' (1998) 15 *TM Cooley Law Review* 3, 8.

61 Local Field Offices produce Local Enforcement Plans, which are consistent with the National Plan and directed at the needs of the local community: USEEOC, *US Equal Opportunity*, above n 59, I.

62 *Ibid* II.

63 Interview with Nick O'Brien, Director of Legal Services, Disability Rights Commission (Phone Interview, London, 21 September 2007).

64 The academics the author interviewed in the United Kingdom praised the UKDRC and its success in this area. See also opinions of commentators in the UKDRC's final publication: see, eg Michael Rubenstein, 'Why the DRC's Legal Strategy Succeeded' in UKDRC, *DRC Legal Achievements: 2000–2007* (Legal Bulletin Issue 12, Legacy Edition, 2007) 11. See also the external recognition the UKDRC received: Agnes Fletcher and Nick O'Brien, 'Disability Rights Commission: From Civil Rights to Social Rights' (2008) 35 *Journal of Law and Society* 520, 534 n 58.

taking them into account when it developed a strategic approach to enforcement.<sup>65</sup> Reflecting on the UKDRC's work five years into its operation, the Commission's Director of Legal Services, Nick O'Brien, summarised the importance of taking a strategic approach:

The aspiration, in the provision of legal services, must be that every case really counts as a significant contribution to the broader strategic agenda. By targeting particular groups, sectors or issues, by seeking clarification of technical obscurities in the higher appellate courts, and by intervening in public law actions that lie at the edge of, or even outside, the primary legislation of which the commission is custodian, an equality commission can bring an extra, and invaluable, 'public interest' dimension to the pursuit of litigation.<sup>66</sup>

The UKDRC's experience offers an informative example of how an equality commission which is not a gatekeeper for complaints can still access suitable complaints and implement its enforcement strategy.<sup>67</sup> The UKDRC established a phone advice line for complainants<sup>68</sup> and for complainants in non-employment related matters who sought a referral to conciliation.<sup>69</sup> The helpline became a source of strategic complaints. Nick O'Brien said that the UKDRC tried to catch the 'good complaints' before they were referred to conciliation<sup>70</sup> — once the issues raised in the complaint were defined, the Commission determined whether it could serve as a test case. If not, the complaint was referred to conciliation.<sup>71</sup> The UKDRC also accessed complaints through other people and organisations working in the area. When the UKDRC developed its strategic approach to enforcing the *Disability Discrimination Act 1995* (UK) ('DDA(UK)') it sought

65 The UKEOC did not begin with a litigation strategy. In its first years, its approach was ad hoc and cases were assisted if their potential to deliver broader change was recognised: Barnard, above n 28, 263. By the mid 1980s, coinciding with the advent of the Conservative government, it started taking a strategic approach to the cases it assisted, as discussed in Part III.

66 O'Brien, 'The GB Disability Rights Commission', above n 51, 253–4. On the UKDRC's strategy see also Nick O'Brien and Caroline Gooding, 'Final Reflections' in UKDRC, *DRC Legal Achievements: 2000–2007* (Legal Bulletin Issue 12, Legacy Edition, 2007) 151, 152; UKDRC, 'Securing Legal Rights in Practice for Disabled People' (Legal Bulletin, December 2001) 3 <<http://www.leeds.ac.uk/disability-studies/archivueuk/DRC/Legal%20Bulletin%20Issue%201.pdf>>; Pauline Hughes, 'Intervention — An Exciting Tool for Tackling Discrimination' (Legal Commentary, UKDRC, 1 February 2005).

67 Cf the UKEOC which was not as proactive. As at 1995, the UKEOC had not advertised for any suitable cases; it relied on potential complainants to approach it: Barnard, above n 28, 271.

68 The helpline took approximately 100 000 calls each year: Nick O'Brien, "'Accentuating the Positive": Disability Rights and the Idea of a Commission for Equality and Human Rights' (Speech delivered at the Industrial Law Society, St Catherine's College, Oxford, 10 September 2004) <<http://www.leeds.ac.uk/disability-studies/archivueuk/DRC/speeches%2020042.pdf>>. The UKDRC was not the only one to operate an advice line. The UKCRE operated an information and assistance phone line and the ECNI has a phone advice line for individuals. Complainants seeking assistance from the IEA can write to it or they are referred to its legal section having sought information from its Public Information Centre.

69 Unlike the older British equality commissions, the UKDRC's founding legislation empowered it to make arrangements for the provision of conciliation for complaints about goods, facilities and services, and education: DRCA s 10 amending *Disability Discrimination Act 1995* (UK) c 50, s 28. Complainants could only utilise conciliation if the UKDRC referred them.

70 Interview with Nick O'Brien, Director of Legal Services, Disability Rights Commission (Phone Interview, London, 21 September 2007).

71 Ibid.

assistance from lobbyists and lawyers to determine the type of litigation to become involved in. In turn, they referred complaints which suited this strategy to the UKDRC. Other sources of relevant complaints were NGOs and public interest groups. Lawyers also brought appeal cases to the UKDRC and if they fitted the strategy, the UKDRC would fund them.<sup>72</sup> By actively seeking suitable complaints, the UKDRC could match appropriate complaints to its strategy, rather than having to frame the strategy around the complaints brought to it.

A strategic approach overcomes the two criticisms levelled at assistance work, as described above. Rather than responding to the complaints brought to the equality commission's attention on an ad hoc basis, the commission uses its established strategy as a guide for choosing appropriate complaints to assist and channelling its resources in the most effective way. As the examples in Part III show, the overseas equality commissions use their assistance function as part of a multi-pronged strategy to change and develop the law. For instance, the UKEOC and UKDRC decided the aspects of the law that they wanted to challenge and develop. From this, they determined the type of complaints they needed to access to achieve this.<sup>73</sup> As part of a strategic approach, it is therefore important for the equality commission to identify legal battlefields and evaluate and update them regularly to ensure that it is fighting discrimination on the most relevant fronts.

### III THE USE MADE OF ASSISTED COMPLAINTS

The criteria used by the overseas equality commissions to decide which complaints to assist are summarised as complaints that: may result in a decision that will affect more than the individual complainant and apply to the group in question;<sup>74</sup> are about areas of the law that require clarification from a higher court;<sup>75</sup> may encourage the legislature to amend the law;<sup>76</sup> are on appeal and fall within the overall strategy;<sup>77</sup> highlight topical issues of concern to a group;<sup>78</sup> or maintain the law's profile and show that the law is being used and enforced.<sup>79</sup> What is common to each criterion is that the equality commissions seek complaints that will have an impact beyond the individual. By generating an outcome that affects

72 Ibid. The UKEOC did the same when it needed cases to take to the European Court of Justice, as discussed in Part III. The UKEOC advertised in trade journals, seeking complaints that fitted its litigation strategy: Karen J Alter and Jeannette Vargas, 'Explaining Variation in the Use of European Litigation Strategies: European Community Law and British Gender Equality Policy' (2000) 33 *Comparative Political Studies* 452, 463.

73 See further discussion in Part III.

74 See, eg, UKCRE, *2003 Annual Report*, above n 54; USEEOC, *US Equal Opportunity*, above n 59, III.

75 The UKCRE could provide assistance 'if the complaint raised a question of principle or if it was unreasonable to expect the complainant to deal with it on their own due to its complexity, their position in relation to the respondent, or any other special consideration': RRA(UK) s 66(1)(b). SDA(UK) s 71(1) is the same, as is the ECNI's policy: ECNI, 'Policy for the Provision of Legal Advice and Assistance' (Policy Document, June 2010) 2–4.

76 Eg the UKCRE, *2003 Annual Report*, above n 54. See also the discussion of the UKEOC in Part III.

77 See discussion of the UKDRC in Part III.

78 See discussion of the UKDRC in Part III.

79 See discussion of the ECNI in Part III.

a group or by changing the law, the equality commissions use their assistance work for maximum impact. Part III presents examples of how the overseas equality commissions have used assisted complaints to achieve different ends.<sup>80</sup> The purpose of each example is to illustrate that the equality commission's involvement contributed to developing the law and helped to secure an outcome which benefited the wider community, not only the individual. Based on these examples, Part IV proposes why it would be valuable for the Australian equality commissions to assist complainants in a strategic way.

## **A Developing the Law through Strategic Litigation**

### **1 The UKEOC's European Litigation**

Through its assistance work, the UKEOC played a key role in developing British anti-discrimination law. The UKEOC was most successful at doing this during the era of the Conservative Thatcher and Major governments<sup>81</sup> when it was faced with a government hostile to its agenda and to the development of gender equality laws.<sup>82</sup> Initially, the UKEOC engaged in lobbying the government. For example, it attempted to persuade the government to raise the ceiling on compensation awards in sex discrimination complaints.<sup>83</sup> After years of lobbying failed, the UKEOC helped fund an appropriate case to change this law, which ultimately reached the European Court of Justice ('ECJ').<sup>84</sup> The UKEOC's approach was to begin with a domestic litigation strategy and appeal unfavourable court decisions. If that was unsuccessful, the Commission would ask domestic courts to refer adverse decisions to the ECJ.<sup>85</sup> By 1995, the UKEOC and the then Northern Ireland Equal Opportunities Commission had funded 15 cases to the ECJ, which constituted one third of all references that the Court heard on equal pay and equal treatment in employment.<sup>86</sup> The UKEOC's strategy resulted in a number of landmark decisions, including removing the ceiling on compensation orders in sex

80 It is acknowledged that the equality commissions do not rely solely on litigation to change the law or achieve outcomes that benefit groups. Assistance work is part of a multi-pronged strategy, which includes lobbying the government to change the law.

81 Alter and Vargas describe the actors committed to gender equality in the country at that time as part of 'perhaps the most famous EC litigation success story': Alter and Vargas, above n 72, 454.

82 Ibid. The British government also sought to prevent further measures relating to equal treatment from being enacted at the European Union level during this time. See Linda Dickens, 'Beyond the Business Case: A Three-Pronged Approach to Equality Action' (1999) 9(1) *Human Resources Management Journal* 9, 11–12.

83 Alter and Vargas, above n 72, 463.

84 *Marshall v Southampton and South West Hampshire Area Health Authority* (C-271/91) [1993] ECR I-4367.

85 Any British court can send the ECJ a question and its decisions bind both the British and other European legal systems. It is acknowledged that the Australian equality commissions cannot duplicate this approach because Australia does not have an equivalent regional judicial body but this approach could be emulated by appealing cases to the High Court. See Part IV below.

86 Barnard, above n 28, 254. Gay Moon said, 'at the time, we [Britain] got a reputation in Europe for taking discrimination cases, whereas other countries had reputations for taking tax cases': Interview with Gay Moon, Head of the Equalities Project, JUSTICE (London, 18 September 2007).

discrimination complaints<sup>87</sup> and shifting the burden of proof to employers once the employee had established a difference in the rate of pay for two jobs of equal value.<sup>88</sup> The UKEOC then introduced the decisions into British law by supporting domestic cases relying upon the ECJ's decisions<sup>89</sup> or using European law to strike down domestic law through judicial review proceedings.<sup>90</sup> If a decision meant that the *Sex Discrimination Act 1975* (UK) ('SDA(UK)') had to be changed, lobbyists would attempt to persuade the government to amend the RRA(UK) as well.<sup>91</sup> Drawing upon the UKEOC's success, trade unions mounted a similar litigation strategy,<sup>92</sup> as did public interest lawyers, interest groups and law centres.<sup>93</sup>

## 2 Strategic Enforcement by the UKDRC

The UKDRC is an example of an equality commission that successfully engaged in 'strategic enforcement'.<sup>94</sup> By the time the UKDRC was established, disability discrimination legislation had been in operation in Britain for five years.<sup>95</sup> This meant that the UKDRC could evaluate the stage of development of the law, ascertain what parts of the legislation were not being used and determine which aspects needed to be clarified and what principles it wanted to test in higher courts.<sup>96</sup> For example, when the UKDRC was established, the law was being used in the area of employment, primarily because there was an established system for conciliating and hearing such matters,<sup>97</sup> but there was less use of the law in the area of goods, facilities and services.<sup>98</sup> The UKDRC's strategy included

87 *Marshall v Southampton and South West Hampshire Area Health Authority* (C-271/91) [1993] ECR I-4367.

88 *Enderby v Frenchay Area Health Authority* (C-127/92) [1993] ECR I-5535.

89 ECJ decisions are unenforceable in British law. Enforcement by a domestic court is the only method of obtaining compliance: Alter and Vargas, above n 72, 460.

90 See, eg, *R v Secretary of State for Employment; Ex parte Equal Opportunities Commission* [1995] 1 AC 1 (HL) which relied on the ECJ's strict standard of 'justification' in *Bilka-Kaufhaus v Weber von Hartz* (Case 170/84) [1986] ECR 160 to strike down an indirectly discriminatory workplace policy. Barnard provides other examples: see Barnard, above n 28, 264–6.

91 Interview with Gay Moon, Head of the Equalities Project, JUSTICE (London, 18 September 2007).

92 Alter and Vargas, above n 72, 458–60.

93 Interview with Gay Moon, Head of the Equalities Project, JUSTICE (London, 18 September 2007).

94 See text accompanying n 65.

95 The DDA(UK) was enacted in 1995 without an enforcement body, partly due to the hostility the two existing equality commissions had encountered. In 1997, the Blair Labour government was elected and art 13 of the European Commission Treaty was introduced, both of which changed the political environment and paved the way for the UKDRC to be established. See generally Tufyal Choudhury, 'The Commission for Equality and Human Rights: Designing the Big Tent' (2006) 13 *Maastricht Journal of European and Comparative Law* 311, 311–2.

96 Interview with Nick O'Brien, Director of Legal Services, Disability Rights Commission (Phone Interview, London, 21 September 2007). See also O'Brien, 'The GB Disability Rights Commission', above n 51, 251 et seq.

97 ACAS and the Employment Tribunals respectively. Non-employment discrimination complaints are dealt with by the County Courts in England and Wales and the Sheriff Court in Scotland.

98 In the first 19 months that the DDA(UK) was operative, only nine cases came before the County Courts: Sandra Fredman, *Discrimination Law* (Oxford University Press, 2002) 169. The reasons for this include that these courts are costly, procedurally complex and damages are low: Sandhya Drew, 'The DDA and Lawyers: DDA Representation and Advice Project' in UKDRC, *DRC Legal Achievements: 2000–2007* (Legal Bulletin Issue 12, Legacy Edition, 2007) 74, 76.

developing the law in these under-utilised areas.<sup>99</sup> Within its first three years of operation, the UKDRC had assisted 164 cases and 56 of them related to goods, facilities and services.<sup>100</sup>

The UKDRC saw itself as a 'guardian' of the DDA(UK)<sup>101</sup> and thought it was therefore important that it was not associated with any 'bad cases'<sup>102</sup> — those that may be lost at first instance or which may develop the law in an unhelpful way.<sup>103</sup> The UKDRC sought to challenge damaging decisions and moderate the impact of the law.<sup>104</sup> The UKDRC also pioneered the approach of an equality commission intervening in litigation in Britain,<sup>105</sup> but it used its intervention function sparingly, as one component of its overall strategy.<sup>106</sup> The UKDRC intervened in cases that highlighted an issue relevant to the disabled community and when it could 'bring an added dimension to the issues in question which the parties cannot'.<sup>107</sup>

## B Obtaining Wider Remedies

The equality commission's involvement in a case often means it can negotiate a remedy that benefits other members of the community, not just the individual complainant. For example, when the IEA assists a complainant, it seeks an order requiring the respondent to change their practices or policies. To fulfil its mandate of fighting discrimination the IEA sees it as necessary to obtain an outcome which has an impact beyond compensating the individual.<sup>108</sup> The ECNI has a similar approach, as discussed below.

When the USEEOC litigates a charge on behalf of a complainant, it is considered to be acting in the public interest, so the Commission will not agree to keep the matter confidential and it seeks wide remedies. If the USEEOC settles a charge, it insists on doing so with a consent decree. This is a public document, filed in federal court and the court retains jurisdiction. The terms of the consent decree

99 Interview with Nick O'Brien, Director of Legal Services, Disability Rights Commission (Phone Interview, London, 21 September 2007). See also O'Brien, 'Accentuating the Positive', above n 68. Establishing a conciliation service for these complaints also contributed to increased use of this part of the legislation.

100 O'Brien, 'The GB Disability Rights Commission', above n 51, 252.

101 Rubenstein, above n 64, 12.

102 Interview with Nick O'Brien, Director of Legal Services, Disability Rights Commission (Phone Interview, London, 21 September 2007).

103 Cases which would potentially set an 'unfortunate' precedent in the disability rights jurisdiction were sent to conciliation so that the complainant could still receive redress: Margaret Doyle, 'Enforcing Rights Through Mediation' in UKDRC, *DRC Legal Achievements: 2000–2007* (Legal Bulletin Issue 12, Legacy Edition, 2007) 57, 59.

104 See, eg, below IV(D) for a discussion of *Jones v The Post Office* (2001) IRLR 384.

105 Rubenstein, above n 64, 12.

106 See, eg, the UKDRC's intervention as a third party in *The Queen (On the Application of (1)A (2) B) v East Sussex County Council* [2002] EWHC 2771 (Admin).

107 Hughes, above n 66. The assistance of the UKDRC in providing the court with expertise was noted for example by Munby J in *Burke v The General Medical Council* [2004] EWCA Civ 1879 (Admin) [34].

108 Interview with Carol Anne Woulfe, Solicitor, Equality Authority (Dublin, 26 September 2007).

vary depending on the circumstances of the complaint. The USEEOC usually seeks employee training on equal opportunity laws and requires employers to develop an equal opportunity policy. If one exists, the USEEOC will review it and ensure that the policy is distributed to all employees. The Commission seeks a requirement that the USEEOC's posters are displayed in the workplace, along with a notice that the lawsuit was settled. It may also seek a monitoring role and require the employer to report to the Commission or regularly provide it with information, such as hiring data.<sup>109</sup> The USEEOC publicises the terms of the consent decree by issuing a media release for all charges it files and settles.<sup>110</sup> It sees publicity as playing an important part in educating potential complainants and other employers.<sup>111</sup>

A well publicised<sup>112</sup> example from the USEEOC's New York District Office was a charge it filed against a well-known Manhattan restaurant, Restaurant Daniel.<sup>113</sup> The charge arose as part of the USEEOC's inquiry into systemic discrimination in the restaurant industry: 'white' employees were primarily working in the 'front of house' as hosts and waiters (which are better paid positions), while 'people of colour' were predominantly working in the 'back of house', working as 'bussers' and washing dishes.<sup>114</sup> In the complaint against Restaurant Daniel, the USEEOC litigated on behalf of eight Hispanic and Bangladeshi 'back of house' staff who claimed that they were discriminated against in their job assignments on the basis of national origin, and that they were victimised.<sup>115</sup> The charge was settled with a consent decree in force for seven years, an unusually long term,<sup>116</sup> which required the respondent restaurant to pay the complainants US\$80 000. The respondent was also required to: refrain from discriminating against an employee; distribute a non-discrimination policy; train its managers in federal equal opportunity law; display the USEEOC's posters and a remedial notice (as prescribed in the decree)<sup>117</sup> in prominent places, such as where employee notices are posted; and allow the USEEOC to monitor and review its compliance with the consent decree by inspecting records or interviewing its employees.<sup>118</sup>

109 Interview with Lisa Sirkin, Supervisory Trial Attorney, Equal Employment Opportunity Commission (New York City, 12 September 2007).

110 See USEEOC, *US EEOC Press Releases FY 2010* <[www.eeoc.gov/press/](http://www.eeoc.gov/press/)>.

111 Interview with Lisa Sirkin, Supervisory Trial Attorney, Equal Employment Opportunity Commission (New York City, 12 September 2007).

112 See, eg, Adam B Ellick, 'Boulud Settling Suit Alleging Bias at a French Restaurant', *The New York Times* (New York) 31 July 2007, *Metropolitan Desk*, 3.

113 *EEOC v Restaurant Daniel*, No. 07-6845 (SDNY, 2 August 2007).

114 Interview with Lisa Sirkin, Supervisory Trial Attorney, Equal Employment Opportunity Commission (New York City, 12 September 2007).

115 USEEOC New York District Office, 'Manhattan Restaurant to Settle EEOC National Origin Bias Suit' (Media Release, 31 July 2007).

116 In this instance, it was difficult for the respondent to negotiate as the New York Attorney-General was also investigating it, so it was in the respondent's interest to settle both claims simultaneously.

117 Prescribed in 'Exhibit B' of the Consent Decree: *EEOC v The 65<sup>th</sup> Street Restaurant LLC d/b/a/ Restaurant Daniel, and the Dinex Group* (2007) United State District Court Southern District of New York, Civil Action No 07CIV6845, <[http://www.ag.ny.gov/bureaus/civil\\_rights/pdfs/Restaurant%20Daniel%20AOD%207-25-07.pdf](http://www.ag.ny.gov/bureaus/civil_rights/pdfs/Restaurant%20Daniel%20AOD%207-25-07.pdf)>.

118 *Ibid.*



## C “Delivering Equality on the Ground”

The ECNI is an interesting example of two aspects of assistance work: the ECNI assists general complaints as well as strategic ones; and, through its terms and conditions for providing assistance, it is able to secure outcomes that benefit other members of the community.

### 1 General and Strategic Complaints

The ECNI chooses to assist strategic complaints and straightforward ones, which are not legally uncertain,<sup>119</sup> because it believes this approach is ‘delivering equality on the ground’.<sup>120</sup> Mary Kitson, Senior Legal Officer at the ECNI, said that through its assistance work, the Commission attempts to maintain a balance between testing and clarifying new grounds of discrimination, such as age and disability, and maintaining the profile of the older ones, such as pregnancy and religious discrimination.

The ECNI’s ability to assist general and strategic complaints is due to its comparatively large budget and the considerable resources it commits to enforcement.<sup>121</sup> The greater resources available to the ECNI are evident when its budget, staffing numbers and population are compared with a similar equality commission, the IEA.<sup>122</sup> In the 2006–07 financial year, the ECNI’s budget was approximately €8.7 million,<sup>123</sup> whereas the IEA’s 2007 budget was €5.6 million.<sup>124</sup> Therefore, the ECNI’s budget was 50 per cent more than the IEA’s. The ECNI

119 Some of the things the ECNI considers when deciding to grant assistance were noted at above n 75. It also considers the extent to which the complaint fits in with the Commission’s strategic objectives, and whether it is likely to raise public awareness; will have a significant impact; has the potential for follow-up by the Commission; and the cost of assistance is commensurate with the benefits to be gained: ECNI, ‘Policy’, above n 75, 3.

120 Interview with Mary Kitson, Senior Legal Officer, Equality Commission for Northern Ireland (Belfast, 25 September 2007). There may have been less need for the ECNI to appeal uncertain cases to higher courts because the three British equality commissions were actively engaged in doing this and any decisions from higher courts affected the law in Northern Ireland. Quinlivan also says that for Irish anti-discrimination law to be effective, the IEA should take ‘a steady run of cases’ not just exceptional ones but this is not currently possible due to the IEA’s workload: Shivaun Quinlivan, ‘Report on Measures to Combat Discrimination — Directives 2000/43/EC and 2000/78/EC’ (Country Report: Ireland, 2007) 61. In late 2008, the IEA was subject to severe funding cuts: see below n 128.

121 This is due to the political circumstances in Northern Ireland which led to its creation, primarily the systemic discrimination suffered by the Catholic population. On its approach, Mary Kitson said ‘we think because we’re such a small jurisdiction, we’ve had so much historical problems with equality, it’s really important that that message gets out there’: Interview with Mary Kitson, Senior Legal Officer, Equality Commission for Northern Ireland (Belfast, 25 September 2007).

122 It is difficult to draw comparisons with the resources of the British equality commissions because they only dealt with one ground of discrimination and were responsible for a larger population. Further, their budgets were not equal; in their final years, the budgets of the UKDRC and UKCRE were twice that of the UKEOC: O’Cinneide, ‘The Commission for Equality and Human Rights’, above n 28, 144 n 7.

123 Based on the exchange rate of 1.2431 (as at 29 August 2008). The ECNI’s budget was £6 998 798: ECNI, *Annual Report & Accounts 2006–2007* (2008) 62.

124 See budget estimates in Quinlivan, above n 120, 67; Judy Walsh et al, ‘Enabling Lesbian, Gay and Bisexual Individuals to Access Their Rights under Equality Law’ (Report, ECNI and The Equality Authority, November 2007).

also had greater staffing resources over that period: it had 139 staff,<sup>125</sup> while the IEA had 51.<sup>126</sup> The ECNI deals with a much smaller population,<sup>127</sup> but it has a lot more resources to devote to them: the ECNI has approximately €4.02 per head of population, while the IEA has approximately €1.32.<sup>128</sup> The comparatively greater resources at the ECNI's disposal means not only can it concentrate on general complaints as well as strategic ones, it can assist a greater proportion of complainants than its counterparts: one in four complainants who apply for assistance from the ECNI receive it.<sup>129</sup> This is in stark contrast to the UKCRE, for instance, which assisted only 3.2 per cent of the employment complainants who applied for assistance in 2003.<sup>130</sup>

## 2 Securing Wider Outcomes

The ECNI attempts to secure wider outcomes through its assistance work. To receive assistance, complainants must agree to two conditions.<sup>131</sup> First, the complainant cannot settle the complaint confidentially. This is so that the ECNI can publicise the settlement. The ECNI publishes names and facts of complaints in its annual settlements publication<sup>132</sup> and issues media releases upon settling a case.<sup>133</sup> The ECNI's aim is to raise awareness amongst the public and to highlight issues and outcomes.<sup>134</sup> Second, the complainant cannot settle the matter without the ECNI, and by extension the community, getting something out of it. For example, as part of the settlement of an employment discrimination complaint, the employer will be required to meet with the ECNI's Employment Development Division<sup>135</sup> within 12 weeks of the agreement to review their practices and procedures, change

125 ECNI, *Annual Report & Accounts*, above n 123, 49.

126 IEA, *Annual Report*, above n 47, 100; Quinlivan, above n 120, 67.

127 The population of Ireland is two and a half times the size of Northern Ireland. As at 2006, the population of Ireland was estimated at 4 239 848: Central Statistics Office Ireland, *Statistics* <<http://www.cso.ie/statistics/Population1901-2006.htm>>. As at 2006, the population of Northern Ireland was estimated at 1 741 619: Northern Ireland Statistics and Research Agency, *Population Statistics* <<http://www.nisra.gov.uk/demography/default.asp3.htm>>.

128 In late 2008, the Irish government announced budget cuts of up to 43 per cent and the IEA's CEO, Niall Crowley, resigned in protest: Carol Coulter, 'Equality Authority Chief Resigns Over Budget Cutbacks', *The Irish Times* (Dublin) 12 December 2008. He was followed by six board members: Anne-Marie Walsh, 'Five Resign From Board of Equality Watchdog' *Independent* (Ireland) 20 January 2009.

129 Interview with Mary Kitson, Senior Legal Officer, Equality Commission for Northern Ireland (Belfast, 25 September 2007). The ECNI's budget for assistance was £270 903 in 2006–07: ECNI, *Annual Report & Accounts*, above n 123, 77.

130 The UKCRE received 1130 requests for assistance, constituting about 36 per cent of all race discrimination complaints. It granted full assistance to 28, limited assistance to nine, and no assistance to 1093: Hepple, above n 43, 109.

131 Interview with Mary Kitson, Senior Legal Officer, Equality Commission for Northern Ireland (Belfast, 25 September 2007). Both are part of the ECNI's terms and conditions for providing assistance.

132 See, eg, ECNI, *Decisions and Settlements Review 2005–2006* (2006).

133 See, eg, ECNI, 'Settlement Allows Woman Back to Work in Belfast' (Media Release, 9 May 2008).

134 ECNI, *Complaint Assistance* <[http://www.equalityni.org/sections/default.asp?cms=your%20rights\\_complainant%20assistance&cmsid=2\\_417&id=417&secid=2](http://www.equalityni.org/sections/default.asp?cms=your%20rights_complainant%20assistance&cmsid=2_417&id=417&secid=2)>.

135 This Division is 'responsible for the provision of equality support to employers. The Division aims to ensure that employers are facilitated to comply with equality legislation and that best practice is promoted': *ibid.* Its services are not means tested so any employer can obtain advice: Interview with Mary Kitson, Senior Legal Officer, Equality Commission for Northern Ireland (Belfast, 25 September 2007).

them if necessary and train their managers accordingly.<sup>136</sup> The terms of settlement will be made public. Mary Kitson said respondents can alleviate any negative publicity by informing the public that they are working with the ECNI to ensure that the situation does not arise again. On the rare occasions that the respondent fails to take the required action, the ECNI can sue.<sup>137</sup> Through this strategy the complainant receives compensation, while the ECNI negotiates something that will benefit a wider group and which delivers equality 'on the ground'.

#### IV THE VALUE OF THE EQUALITY COMMISSION ASSISTING COMPLAINANTS

The Australian equality commissions are predominantly concerned with complaint handling and conciliation. The majority cannot advise and assist complainants; those that can assist complainants do so to a limited extent. It is curious that most Australian legislatures chose not to invest the equality commissions with an assistance function, especially since this model was operating elsewhere when the Australian equality commissions were created.<sup>138</sup> One reason for the legislatures' hesitation could be the potential conflict of interest. Since all of the Australian equality commissions have a conciliation function, there is a potential conflict of interest if the equality commission can advise the complainant *and* it is required to facilitate conciliation. The South Australian government's comments support this.<sup>139</sup> For the purposes of this discussion, it is not necessary to explain the legislatures' behaviour conclusively. If the equality commissions are divested of their complaint handling and conciliation functions (and they are assumed by the tribunal or another institution), any potential conflict ceases to be a concern. This would mean that the equality commissions would be free to act as an advocate for the law and advise and assist complainants without any expectation that they will act impartially.

By investing the equality commission with an enforcement role, Dickens says that the state is indicating the importance of eliminating discrimination. The state is signifying that addressing discrimination is not solely the concern of the individual parties; it is in the public's interest too.<sup>140</sup> Based on the experience of the equality commissions in other countries, Part IV proposes five reasons it would be valuable for the Australian equality commissions to assist complainants and have a visible enforcement role: increasing access to justice; developing the law; maintaining the law's profile; increasing the threat of litigation; and so

136 Interview with Mary Kitson, Senior Legal Officer, Equality Commission for Northern Ireland (Belfast, 25 September 2007).

137 Mary Kitson described an instance of a wheelchair user who was unable to access a shop and the retailer agreed to provide such facilities as part of the settlement. When it failed to do so, the ECNI sued. This emphasised the importance of the agreement: *ibid.*

138 The UKCRE replaced the Race Relations Board in 1976, so it pre-dates all of the Australian equality commissions. The UKCRE could assist complainants: see above n 35.

139 See above n 13.

140 Dickens, 'The Road is Long', above n 2, 475.

that the equality commissions become ‘repeat players’. This is followed by an examination of some shortcomings of this type of work.

### A Increasing Access to Justice

A person bringing a discrimination complaint in Australia faces many obstacles, such as cost and requiring legal advice to help them to navigate complex law and unfamiliar judicial procedures. It is because of these obstacles that many complainants choose to settle. Indeed, ADR is offered so that people can access justice but avoid dealing with the formal legal system and its complexities. By providing assistance, the equality commission could start to address some of these obstacles. The equality commission’s assistance would increase access to justice by decreasing the financial burden on the complainants it assists and providing them with support.<sup>141</sup> For example, the UKDRC chose to assist the most disadvantaged disabled people who were least likely to have access to justice and be able to enforce their rights.<sup>142</sup>

Like the Australian equality commissions, the overseas equality commissions also provide general, informal advice about the law in response to inquiries.<sup>143</sup> However, it is their ability to provide informed advice, rather than general information, which is necessary for increasing access to justice. Graham O’Neill, Senior Legal Policy Officer at the UKCRE, distinguished between the UKCRE offering general information about the law on its website and over the phone and providing a complainant with informed advice about the merits of their complainant. He thought that having access to informed advice from the Commission had increased access to justice for race discrimination complainants.<sup>144</sup> However, by providing assistance, an equality commission should not assume the role of a law centre or Legal Aid provider.<sup>145</sup> Nor should its assistance be regarded as a substitute for the public provision of legal funding.<sup>146</sup> The equality commission must retain its strategic approach. Instead, the value of the equality commission taking on an assistance role is that it opens up another

141 Bob Ross, a complainant assisted by the UKDRC, said that he could not have pursued his case without the UKDRC’s support due to the cost: Bob Ross, ‘A Claimant’s Perspective: Ross v Ryanair Ltd and Stansted Airport Ltd’ in UKDRC, *DRC Legal Achievements: 2000–2007* (Legal Bulletin Issue 12, Legacy Edition, 2007) 31, 32.

142 O’Brien refers to nine cases brought on behalf of people with learning difficulties and mental illness: O’Brien, ‘The GB Disability Rights Commission’, above n 51, 254.

143 See above n 68.

144 Interview with Graham O’Neill, Senior Legal Policy Officer, Commission for Racial Equality (London, 18 September 2007). See also comments by the UKCRE that changes to the provision of public legal aid which would mean lawyers could only spend five hours on a discrimination complaint are inadequate. Due to the complex nature of the law, a complaint requires specialist expertise: UKCRE, *Response to the Discrimination Law Review* (2007) 25–7.

145 See further O’Brien, ‘Accentuating the Positive’, above n 68.

146 There is still a need for increased legal funding for discrimination complaints, particularly as they are likely to be lodged by members of marginalised groups who are unlikely to have access to legal support, but this is not the role for an equality commission per se. The UKCRE, for instance, partly funded a network of Race Equality Councils who could also assist complainants. These Councils were local bodies that the UKCRE referred complainants to but they were separate from the UKCRE.

avenue for complainants in this area of law, which, at present, offers complainants little financial support.<sup>147</sup>

## B Developing the Law

Discrimination has been prohibited in Australia for over 30 years, yet a relatively small body of case law has developed in this time. The reason for this is that the vast majority of discrimination complaints settle or they are withdrawn prior to hearing so the courts have had limited opportunities to apply and interpret the legislation.<sup>148</sup> For the purposes of this discussion, it is not necessary to examine the reasons for this, only to recognise that the result is there are aspects of anti-discrimination law that the courts have not considered.

Anti-discrimination law is a relatively new area of law and its principles are still evolving. It is based on statutory rights, so it is not supported by a well-developed body of common law like 'older' areas, such as tort or equity. Guidance about the law's application comes from the statutes and their interpretation. Courts have had limited opportunities to provide this guidance over the last three decades, particularly the superior courts. The High Court has not considered the *Sex Discrimination Act 1984* (Cth), for example, nor has it considered age discrimination. Indeed, in the slightly more than 30 years that Australian law has prohibited discrimination, the High Court has substantively considered the legislation on only seven occasions.<sup>149</sup> Most of these decisions relate to disability discrimination.<sup>150</sup> Only one involved race discrimination<sup>151</sup> and there is only one authoritative decision about the application of special measures.<sup>152</sup> Although the State and Territory legislation is substantially similar to the Commonwealth's, the High Court has only considered the legislation in Victoria, Western Australia and New South Wales. A clear body of case law has not emerged from the High Court and a coherent body of jurisprudence from superior courts in the States and Territories has not filled this gap either. This means that there is little guidance for lower courts and tribunals about how to apply and interpret the law.<sup>153</sup>

147 Discrimination complainants do not receive Legal Aid, for instance.

148 For example, the AHRC received 1779 discrimination complaints in 2006–07, yet the federal courts heard only 12 substantive matters in 2007. See generally Dominique Allen, 'Behind the Conciliation Doors Settling Discrimination Complaints in Victoria' (2009) 18 *Griffith Law Review* 778, 780 Table 1.

149 See generally *Gerhardy v Brown* (1985) 159 CLR 70; *Australian Iron & Steel v Banovic* (1989) 168 CLR 165; *Waters v Public Transport Corporation* (1991) 173 CLR 349; *IW v Perth* (1997) 191 CLR 1; *X v Commonwealth* (1999) 200 CLR 177; *Purvis v New South Wales* (2003) 217 CLR 92; *New South Wales v Amery* (2006) 226 ALR 196. This excludes a number of the High Court cases in which the procedural implications of anti-discrimination law have been considered: see, eg, *University of Wollongong v Metwally* (1984) 158 CLR 447; *Western Australia v Commonwealth* (1995) 183 CLR 373; *Brandy v Human Rights and Equal Opportunities Commission* (1995) 183 CLR 245.

150 *Waters v Public Transport Corporation* (1991) 173 CLR 349; *IW v Perth* (1997) 191 CLR 1; *X v Commonwealth* (1999) 200 CLR 177; *Purvis v New South Wales* (2003) 217 CLR 92.

151 *Gerhardy v Brown* (1985) 159 CLR 70.

152 *Ibid.*

153 See generally Neil Rees, Katherine Lindsay and Simon Rice, *Australian Anti-Discrimination Law: Text, Cases & Materials* (Federation Press, 2008) 28.

The small body of case law also affects the complaint resolution process. Decisions that make it difficult for the complainant to establish discrimination may influence a complainant's decision to settle, particularly if they have legal advice. The small body of decided cases gives the equality commissions and lawyers little authority for interpreting the law, meaning they are less certain about how the tribunal would decide a complaint. Finally, limited case law means that potential respondents and the wider community do not know what compliance requires.

There is great scope for an equality commission to institute a strategy to clarify untested principles and continue to develop the law. Since anti-discrimination law has been operating for over 30 years, the Australian equality commissions, like the UKDRC, could evaluate its stage of development and select principles to test in higher courts and unfavourable decisions to challenge. Two examples of unfavourable decisions which could be tested are *Victoria v Schou*<sup>154</sup> and *Purvis v New South Wales*.<sup>155</sup> In most jurisdictions,<sup>156</sup> to establish indirect discrimination the complainant is required to prove *inter alia* that the requirement, condition or practice in question was unreasonable.<sup>157</sup> 'Reasonableness' is the pivotal element on which the definition of indirect discrimination is centred: if the complainant cannot establish that the respondent's behaviour was unreasonable, it means that a requirement, condition or practice which would otherwise have constituted indirect discrimination is not unlawful. In *Victoria v Schou*, the Victorian Court of Appeal interpreted the reasonableness requirement narrowly, making it more difficult for the complainant to establish indirect discrimination.<sup>158</sup> In a direct discrimination complaint, the complainant must establish that a person of a different status ('the comparator') was or would have been treated differently than they were.<sup>159</sup> The High Court's decision in *Purvis v New South Wales* ('*Purvis*') complicated the already difficult process of identifying the comparator. The child complainant in *Purvis* suffered from a severe brain injury which caused violent behaviour and he was expelled from school. The question before the High Court was whether the manifestation of the child complainant's disability — his violent outbursts — were part of the disability and thus excluded from the comparison, or whether they were to be considered as part of the same or similar circumstances. The majority found that since the child's violent outbursts led to his expulsion from school, it would be artificial to remove them from the objective circumstances. They identified the relevant comparator as a student who engaged in the same violent behaviour but who did not have a disability.<sup>160</sup> The Court did not limit its reasoning to disability discrimination and *Purvis* has been applied

154 (2004) 8 VR 120.

155 (2003) 217 CLR 92.

156 The exceptions are indirect discrimination in Queensland and federal sex, disability and age indirect discrimination complaints: *Anti-Discrimination Act 1991* (Qld) ss 204, 205; *Sex Discrimination Act 1984* (Cth) s 7C; *Disability Discrimination Act 1992* (Cth) s 6(4); *Age Discrimination Act 2004* (Cth) s 15(2).

157 See, eg, *Equal Opportunity Act 1995* (Vic) s 9.

158 *Victoria v Schou* (2004) 8 VR 120, 128–31.

159 See, eg, *Equal Opportunity Act 1995* (Vic) s 8(1).

160 *Purvis* (2003) 217 CLR 92, 137 (Glesson CJ); see also at 185 (Gummow, Hayne and Heydon JJ).

in other contexts.<sup>161</sup> The equality commission's strategy could include pursuing a line of cases which modify — and ultimately limit — the unfavourable impact of these decisions.

Following a strategic approach, the Australian equality commissions could also use the law in under-utilised areas and those which have caused difficulties. For instance, considering how difficult race discrimination complaints are to prove,<sup>162</sup> this would be an ideal area to focus on. The equality commission could assist a range of strong race discrimination cases and develop the jurisprudence in this area. Australia has a long history of race discrimination and its effects are still felt, particularly by Indigenous peoples who suffer disproportionate levels of disadvantage compared with the non-Indigenous population. Assisting race discrimination complaints, particularly those made by Indigenous complainants, would highlight that race discrimination continues to be a problem<sup>163</sup> and it would develop the body of case law in this area.

It is worth noting, as part of this discussion, that appearing in litigation is another useful way the equality commissions can endeavour to develop the law. As noted in Part II, some of the Australian equality commissions already have an *amicus curiae* or an intervention power. If the equality commissions are to be advocates, rather than gatekeepers, it follows that they should all have such powers. Intervening in litigation relevant to discrimination and equality is considered to be a function incidental to the equality commission's mandate of addressing discrimination. It was for this reason that the House of Lords held that, although the Northern Ireland Human Rights Commission did not have the express power to intervene in litigation, intervention was a power incidental to the Commission's express duties and thus it could exercise it.<sup>164</sup> The benefits of litigation powers are that they enable the equality commission to raise broader issues which the individual parties are not concerned with and unlikely to have the resources to argue.<sup>165</sup> In addition, they enable the equality commission to

161 See, eg, *Zygorodimos v Department of Education and Training* [2004] VCAT 128 (3 February 2004) [51]–[58] (Deputy President McKenzie); *Howe v Qantas Airways Ltd* [2004] FMCA 242 (15 October 2004) [118].

162 See also Jonathon Hunyor, 'Skin-deep: Proof and Inferences of Racial Discrimination in Employment' (2003) 25 *Sydney Law Review* 535.

163 The ECNI continues to assist religious discrimination complaints for a similar reason — that the ongoing existence of this form of discrimination is highly relevant to that society. Likewise, highlighting the ongoing discrimination of Indigenous peoples is important in Australia if inequality is to be reduced.

164 *Re Northern Ireland Human Rights Commission* [2002] UKHL 25 (20 June 2002). Barry expresses the same opinion about equality commissions generally: Eilis Barry, 'Interventions and Amicus Curiae Applications, Making Individual Enforcement More Effective' in Dagmar Shiek, Lisa Waddington and Mark Bell, *Cases, Materials and Text on National, Supranational and International Non-Discrimination Law* (Oxford University Press, 2007) 8.IE.20. Following the House of Lords decision, the United Kingdom equality commissions were more willing to intervene in litigation: McColgan, above n 29, 385.

165 For example, the UKCRE, UKEOC and UKDRC intervened in the Court of Appeal's decision *Igen v Wong* [2005] ICR 931 ('*Igen*'), in which the Court clarified the operation of a recent legislative amendment to the burden of proof in discrimination cases. The Court's interpretation of the operation of the shift in burden had implications for future complainants, but the complainants in *Igen* would not necessarily have had the expertise, the resources or the desire to make broader policy arguments, whereas the equality commissions could.

influence cases other than discrimination complaints which relate to equality and disadvantage.<sup>166</sup> The equality commission offers the court its expertise and brings its opinion of how the law should be interpreted and policy considerations to the proceedings. However, these powers should be exercised in keeping with the equality commission's overall strategy, which is how the UKDRC and USEEOC regard these powers.

### **C Maintaining the Law's Profile**

The equality commission's assistance work is a useful way of maintaining the law's profile. The overseas equality commissions do this in two ways: by resisting confidential settlements; and by regularly releasing information about complaints into the public sphere. At this point, it is important to recall that the vast majority of discrimination complaints in Australia are not resolved through a court hearing; they are withdrawn or settled prior. The terms of settlement are usually confidential and the Australian equality commissions release very little information — not even in a de-identified form — about the type of complaints made or how they were resolved.<sup>167</sup> The promise of confidentiality will often be necessary to get the parties to the negotiating table<sup>168</sup> but it limits the law's development. Confidentiality restricts the available information about the conciliation process, meaning later conciliation participants do not have access to information, nor can the process deter would-be discriminators. The absence of information, even in a de-identified form, that the equality commissions make available compounds this problem. Most importantly, confidentiality masks the extent to which discrimination remains a problem in society.

#### **1 Resisting Confidentiality**

As discussed above, both the USEEOC and ECNI have strict policies regarding confidentiality: neither will agree to a confidentiality clause as part of a settlement. The equality commission's ability to do this rests on its stronger bargaining power compared to an individual acting on their own.<sup>169</sup> Mary Kitson said that over time respondents have come to accept that the ECNI will not agree to confidentiality.

166 See further O'Brien, 'Accentuating the Positive', above n 68, discussing how the UKDRC used the *Human Rights Act 1998* (UK) to overcome defects in DDA(UK).

167 For further discussion of the pros and cons of the prominence of confidentiality in this jurisdiction and the lack of information about complaints released by the equality commissions, see Dominique Allen, above n 148, 781–3.

168 According to Thornton, without confidentiality, respondents would not be prepared to be labelled as wrongdoers and complainants may be deterred from lodging a complaint: Margaret Thornton, 'Equivocations of Conciliation: The Resolution of Discrimination Complaints in Australia' (1989) 52 *Modern Law Review* 733, 740. See also comments by equality commission staff and lawyers on the importance of confidentiality: *ibid* 786.

169 Lisa Sirkin, Mary Kitson and Carol Ann Woulfe all commented on the equality commission's stronger bargaining position in this regard: Interview with Lisa Sirkin, Supervisory Trial Attorney, Equal Employment Opportunity Commission (New York City, 12 September 2007); Interview with Mary Kitson, Senior Legal Officer, Equality Commission for Northern Ireland (Belfast, 25 September 2007); Interview with Carol Anne Woulfe, Solicitor, Equality Authority (Dublin, 26 September 2007).



They also know that the Commission does not have to negotiate because, unlike an individual, it has the resources to run cases if necessary.<sup>170</sup>

However, public settlements are not appropriate for all complainants or for all types of complaints and they may deter potential complainants.<sup>171</sup> While non-confidential settlements should certainly be the starting position, a strict policy, like the USEEOC and ECNI have, is not preferred. The law's objectives would not be fulfilled if people were discouraged from applying for assistance because they feared publicity. It is for this reason that the IEA does not have such an aggressive policy as the ECNI. Carol Ann Woulfe, solicitor at the IEA, said this might deter those who genuinely need assistance from approaching the IEA.<sup>172</sup> Although the IEA prefers that settlements are not confidential, it balances that preference with recognising that there are times when matters need to be confidential, even when that means the IEA cannot maximise their impact through publicity.<sup>173</sup> For example, in 2007, the IEA wanted to publicise the facts of a settled complaint because it highlighted issues surrounding the influx of non-Irish workers. In return for confidentiality, the respondent offered the complainant the maximum compensation the Equality Tribunal could award and the complainant agreed.<sup>174</sup>

Whether or not to agree to confidentiality should be discretionary and flexible, according to the circumstances of the complaint. For instance, the equality commission may attempt to negotiate a clause which enables it to publicise some aspects of the complaint, such as the relevant industry or the outcome negotiated. Factors the equality commission may consider in assessing the need for confidentiality are: the nature of the discriminatory behaviour including its extent and whether or not it is systemic; whether the respondent is a 'repeat offender' and, if so, how previous complaints were resolved; and the respondent's willingness to effectively address the complaint in return for confidentiality, such as by taking wider, systemic action. On each occasion, it will be necessary to strike a balance between the complainant's needs and the community's needs and this should be a policy matter for the equality commission to decide.

170 Interview with Mary Kitson, Senior Legal Officer, Equality Commission for Northern Ireland (Belfast, 25 September 2007).

171 For example, sexual orientation. Mary Kitson said that very few people came forward to make complaints about discrimination based on sexual orientation, partly because of the publicity attached both to settlement and hearing: *ibid.*

172 Interview with Carol Anne Woulfe, Solicitor, Equality Authority (Dublin, 26 September 2007).

173 Carol Ann Woulfe recalled a complaint about a local authority's failure to reasonably accommodate a mother and her autistic child. The case highlighted poor procedures and lack of disability awareness. The Tribunal ordered the authority to provide the mother with a house within a year, so its impact was potentially great. However, the mother thought it would be difficult for herself and the child if their names were made public so they were kept confidential: *ibid.*

174 *Ibid.* An order for compensation is capped under the *Equal Status Act 2000–2004* (Ireland) s 27 at €6349 and the *Employment Equality Act 1998–2004* (Ireland) s 82(4) at two years pay and €12 697 for someone who was not an employee.

## 2 Releasing Information to the Community

The overseas equality commissions publicise the complaints they assist, both identified and anonymously. For example, the UKDRC would issue a media release when it settled a complaint and after successful litigation,<sup>175</sup> as does the USEEOC.<sup>176</sup> The IEA publishes identified information about the cases it assists, including those which are settled, in its Annual Report<sup>177</sup> and the ECNI publishes an annual *Decisions and Settlements Review*. The Review includes identified facts and outcomes of all the complaints that the ECNI assisted during that period.<sup>178</sup> Releasing information about the complaints helps the equality commission to maintain the law's profile and increase the law's ripple effect by: showing that the law is being enforced, which may deter would-be discriminators; and by promoting awareness of the legislation, which may encourage other complainants to come forward. The latter is one reason the ECNI publicises the facts and outcomes of the complaints it assists. Mary Kitson said, 'if we publish outcomes of our cases people know, "oh that happened to me, I should complain"'.<sup>179</sup> Therefore, publicising settlements and outcomes shows that discrimination still exists, victims can obtain relief, and the law prohibits discrimination and it will be enforced.

### C The Threat of Litigation

Currently, the Australian equality commissions undertake various promotional activities to encourage voluntary compliance with the law. For instance, the AHRC engages in education, research, media work and community outreach activities. However, the 'carrot' of voluntary compliance becomes more attractive to potential respondents if the equality commission also wields the 'stick' of enforcement. The USEEOC actually litigates very few charges,<sup>180</sup> but to strengthen its ability to settle charges, the Commission believes it is critical to have a 'credible and visible litigation program'.<sup>181</sup> Lisa Sirkin, Supervisory Trial Attorney at the USEEOC's New York District Office, said that for some respondents the threat of a lawsuit is the best way to encourage compliance voluntarily:

175 See, eg, UKDRC, 'Appeal Court Rules Airport and Airline Jointly Responsible for Disabled Passengers' (Media Release, 21 December 2004); UKDRC, 'Jessops Pays Compensation to Disabled Man Who Couldn't Get into Store' (Media Release, 18 September 2007) <[http://drc.uat.room.net/DRC/newsroom/news\\_releases.aspx](http://drc.uat.room.net/DRC/newsroom/news_releases.aspx)>.

176 See, eg, above n 115.

177 See, eg, IEA, *Annual Report*, above n 47.

178 See, eg, ECNI, *Decisions and Settlements Review*, above n 132.

179 Interview with Mary Kitson, Senior Legal Officer, Equality Commission for Northern Ireland (Belfast, 25 September 2007).

180 The Commission litigates less than 2 per cent of total charges in the New York District: Interview with Lisa Sirkin, Supervisory Trial Attorney, Equal Employment Opportunity Commission (New York City, 12 September 2007). As at 2002, nationally it litigated less than 300 cases of the approximately 80 000 charges that were filed: *EEOC v Waffle House Inc* 534 US 279, 290 (2002).

181 Igasaki and Miller, above n 60, III.

[Y]ou can do conciliation and all that, but ... some companies, some people are not going to look at you twice unless they know that you can bring them to court and it's going to cost them a lot of money and bad publicity.<sup>182</sup>

Regulatory theorists, such as Braithwaite, argue that persuasion will be more effective in securing compliance when it is supported by punishment.<sup>183</sup> Braithwaite proposes a regulatory pyramid with persuasion at its base. This progressively escalates in stages if voluntary compliance is unsuccessful until it reaches punitive sanctions at the pyramid's apex.<sup>184</sup> Based on this idea, Hepple, Coussey and Choudhury developed an enforcement pyramid designed to regulate equal opportunities.<sup>185</sup> At the pyramid's base is persuasion, then education. Above them is a voluntary action plan to promote 'best practice'. This escalates to equality commission investigation, followed by it issuing a compliance notice for failure to comply with the commission's requests. At the upper levels are judicial enforcement and then sanctions. Withdrawal of government contracts or licences sits on the apex.<sup>186</sup>

The discussion in this article has taken a narrow approach to enforcement, focusing on assistance, and ultimately litigation, as a means of enforcing the law. Primarily this is because assistance has been the principal means of enforcement used by the overseas equality commissions; they have faced political resistance to the idea of exercising their investigative functions.<sup>187</sup> Within the framework of this discussion, the upper levels of Hepple et al's enforcement pyramid are more relevant.

The regulatory approach suggests that introducing the 'stick' of enforcement via litigation may strengthen the appeal of the voluntary compliance mechanisms the Australian equality commissions already use. For this approach to be most effective, the threat of enforcement must be real and what compliance entails must be clear. The respondent must believe that a complaint may be made against them and that the equality commission will enforce it. In essence, this threat is what the USEEOC relies upon to encourage compliance, as the earlier comment from Sirkin demonstrates.<sup>188</sup> Similarly, Niall Crowley, the IEA's former Chief Executive Officer, writes:

182 Interview with Lisa Sirkin, Supervisory Trial Attorney, Equal Employment Opportunity Commission (New York City, 12 September 2007).

183 John Braithwaite, 'Rewards and Regulation' (2002) 29 *Journal of Law and Society* 12, 19.

184 Ibid 20, Figure 2, citing Ian Ayres and John Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (Oxford Socio-Legal Studies, 1995) 33.

185 Bob Hepple, Mary Coussey and Tufyal Choudhury, *Equality: A New Framework — Report of the Independent Review of the Enforcement of UK Anti-Discrimination Legislation* (Hart Publishing, 2000) ch 3.

186 Ibid particularly 58–9, [3.6] and Figure 3.1. This approach is reflected in the enforcement activities of the FWO, as discussed in Part II. A modified version will be introduced in Victoria from August 2011: see *Equal Opportunity Act 2010* (Vic) pt 9. On the application of a regulatory approach to Australia, see Belinda Smith, 'Not the Baby and the Bathwater: Regulatory Reform for Equality Laws to Address Work–Family Conflict' (2006) 28 *Sydney Law Review* 689.

187 See above nn 27–9.

188 See above n 182.

Employers and service providers need to be clear that where discrimination happens enforcement will follow. The legislation needs to be seen to be regularly enforced or it will fail to have any significant impact.<sup>189</sup>

Further, encouraging voluntary compliance requires clear law. Sternlight writes that society needs ‘clear and public precedents to deter future wrongdoers and let persons know what conduct is permissible’.<sup>190</sup> Respondents need to know what compliance requires, so the equality commission needs to disseminate information about successful cases to increase awareness of what is permitted and what is prohibited. Alter and Vargas write that if a respondent knows that they could lose in court, they will be more willing to adjust their policies and practices voluntarily. They concur that the ‘credible threat ... [of litigation] can be a weapon in itself’.<sup>191</sup> The threat of litigation relies on the equality commission’s much stronger bargaining power — the respondent knows that the equality commission has the resources to litigate if necessary, unlike most individuals.<sup>192</sup> This explains why the overseas equality commissions are able to negotiate wider remedies when they settle an assisted complaint. For example, when the UKDRC settles complaints on behalf of individuals, in some instances it has secured wider remedies than a court could have ordered.<sup>193</sup> In those situations, the respondents voluntarily agreed to change their practices and enter into a binding agreement with the UKDRC<sup>194</sup> as part of settling the complaint rather than risk litigation.

#### **D The Equality Commission Becomes a ‘Repeat Player’**

Galanter has suggested that parties in litigation can be divided into two types — One-Shotters, who are involved in litigation only on occasion, and Repeat Players, who are involved in several court actions over time.<sup>195</sup> A complainant in a discrimination case is typically a One-Shotter: they expect the case to be their only experience of litigation, the stakes are high and the cost of enforcing their

189 Niall Crowley, *An Ambition for Equality* (Irish Academic Press, 2006) 44.

190 Sternlight, above n 34, 1478.

191 Alter and Vargas, above n 72, 464–5.

192 Interviews the author conducted with lawyers practising in discrimination law in Victoria revealed that some respondents resist settling complaints at conciliation because they are prepared to ‘call the complainant’s bluff’. They judge whether the complainant has the money to pursue the complaint and then take the risk that the complainant will not refer the complaint to court, knowing that even if they do, they can still settle before hearing: Dominique Allen, above n 148, 787–8.

193 For example, a university agreed to audit its policies and procedures in order to make course materials more accessible for disabled people in *Chan v Bradford University* [2004] (settled) and a retailer agreed to improve disability access in all of its stores within a set timeframe in *Jackson v Debenhams plc* [2006] (settled): reported in UKDRC, ‘In Brief: DRC Key Cases’ in UKDRC, *DRC Legal Achievements: 2000–2007* (Legal Bulletin Issue 12, Legacy Edition, 2007) 116, 124–5.

194 The UKDRC could enter into voluntary binding agreements: DRCA s 5. It entered into 11 agreements between 1 April 2004 – 31 July 2007 as part of the settlement of a non-employment complaint: UKDRC, ‘In Brief: Statistical Analysis’ in UKDRC, *DRC Legal Achievements: 2000–2007* (Legal Bulletin Issue 12, Legacy Edition, 2007) 137, 144.

195 Marc Galanter, ‘Why the “Haves” Come Out Ahead: Speculations on the Limits of Legal Change’ (1974) 9 *Law & Society Review* 95.

rights may outweigh the potential outcome.<sup>196</sup> Respondents are typically Repeat Players, for instance a large employer or government department. Typically, they have taken part in litigation before and probably will again, the stakes are low and they have the resources to pursue long-term interests.<sup>197</sup>

If an equality commission regularly takes part in litigation, either through assisting complainants or appearing as a third party, it can develop the characteristics of a Repeat Player and experience the advantages Galanter identifies.<sup>198</sup> First, a Repeat Player has advance intelligence since they have taken part in similar litigation before. Therefore, they are already familiar with the arguments and practicalities of running a case. Second, Repeat Players develop expertise and have access to specialists. For example, the British equality commissions benefited from the continuous involvement of prominent academics and barristers in their legal assistance and litigation work.<sup>199</sup> This relates to a third advantage; Repeat Players have the opportunity to develop facilitative informal relationships with institutions.<sup>200</sup> Fourth, Repeat Players can play the odds. Galanter argues that the stakes are lower for a Repeat Player than a One-Shotter, so the former can develop a strategy to maximise gains over a series of cases. This relates to the fifth and sixth advantages; the Repeat Player can play for changes to rules or precedent, as well as immediate gains, and it can play for changes to litigation or procedural rules.

An illustration of how the equality commissions can benefit from the advantages of being a Repeat Player is the line of cases pursued by the UKDRC to moderate the detrimental impact of a Court of Appeal decision.<sup>201</sup> In *Jones v The Post Office*<sup>202</sup> (*Jones*'), the Court of Appeal examined the justification defence to a direct discrimination complaint on the ground of disability. The Court found that there was a low threshold to establish the defence, making it easier for employers to escape liability.<sup>203</sup> Realising the potentially negative impact of the *Jones* decision, the UKDRC developed a litigation strategy that attempted to moderate its impact. The Commission pursued what O'Brien describes as 'a consistent thread of argument in the higher courts'.<sup>204</sup> This led the Commission to support a complainant in the first House of Lords decision to consider the DDA(UK), which ultimately limited the effect of the *Jones* decision.<sup>205</sup> This example shows how the

196 Ibid 98.

197 Ibid.

198 Ibid 98–103.

199 Barnard, above n 28, 260. Barnard refers to the involvement of Lord Lester QC with the UKEOC: at n 32. Robin Allen QC also represented the British equality commissions on many occasions and was a specialist legal adviser to the UKDRC: Robin Allen, 'Strategic Litigation in Enforcing the Duty to Make Reasonable Adjustments', in UKDRC, *DRC Legal Achievements: 2000–2007* (Legal Bulletin Issue 12, Legacy Edition, 2007) 15.

200 See, eg, above n 199. The equality commission may also develop relationships with community legal centres and other public interest law centres.

201 The UKEOC's strategy of taking a series of cases to the ECJ is another pertinent illustration: see above Part III(A)(1).

202 (2001) IRLR 384.

203 Ibid.

204 O'Brien, 'Accentuating the Positive', above n 68. O'Brien also discusses the ensuing cases that challenged *Jones* which were supported by the UKDRC.

205 *Archibald v Fife Council* [2004] IRLR 651.

UKDRC could ‘play the odds’ and utilise its resources to change a rule, whereas the One-Shotter’s attention will be on their immediate gain or remedy; they are not concerned with the operation of similar litigation in the future. It is for this reason, Galanter says, that he expects precedents to favour the Repeat Player: they expect to be involved in litigation again, so they are concerned with how the law operates and are more likely to appeal cases which will produce favourable outcomes.<sup>206</sup>

The body of anti-discrimination case law in Australia is relatively small. Much of it favours respondents who have the resources to appeal unfavourable decisions.<sup>207</sup> Following Galanter’s reasoning, the equality commission could take advantage of being a Repeat Player and attempt to adjust the balance in the case law so that there are more outcomes favourable to complainants; the equality commission then becomes the Repeat Player who enjoys the advantage in litigation, rather than the respondent. An equality commission may enjoy a slightly modified version of Galanter’s advantages because in one way, it is an unusual Repeat Player. The equality commission must consider the complainant’s interests in addition to its strategic objectives. Accordingly, it may settle more cases than a typical Repeat Player. Settlement is generally an issue in strategic litigation, as considered below.

## **E Limitations of Assisting Complainants**

Two criticisms of the equality commission engaging in assistance work were noted at the outset: assisting complainants can consume the equality commission’s resources and stumbling upon a ‘landmark’ case can be accidental. Taking a strategic approach to assistance work overcomes these two issues, as discussed. This section presents some of the shortcomings of assistance and raises some ethical issues that the equality commissions may face in assisting complainants.

First, it can be difficult to predict which complaints are ‘strategic’. The experience of some involved in this work is that it is often the seemingly ordinary complaints that later become strategic and they are not usually offered assistance.<sup>208</sup> However, the equality commission could subsequently assist such cases once they reach the higher courts and are regarded as ‘strategic’. Second, there are limits to relying on litigation to develop the law. It is not guaranteed that a case will succeed, for instance, or that an outcome will be favourable. Nor is there any assurance that a successful case will result in favourable legislative reform. For these reasons, the equality commissions that used assistance strategically did not rely on it solely to change the law. They pursued litigation after other avenues failed. For example, the UKEOC began by extensively lobbying the Conservative government. It was only when that approach was unsuccessful that it began taking cases to the

<sup>206</sup> Galanter, above n 195.

<sup>207</sup> See generally Beth Gaze, ‘The Costs of Equal Opportunity’ (2000) 25 *Alternative Law Journal* 125, 126 discussing this in the federal context.

<sup>208</sup> Interview with Gay Moon, Head of the Equalities Project, JUSTICE (London, 18 September 2007).

ECJ. The UKDRC also pursued other strategies and did not resort to litigation immediately.<sup>209</sup> Therefore, the equality commission should not forgo its other law reform work, such as research, education and lobbying. Litigation and assistance thus forms part of a multi-pronged strategy which ultimately seeks to benefit marginalised groups.

Third, assisting complainants consumes resources. Even though the ECNI is well resourced in comparison to other equality commissions, on occasion its legal budget has been stretched.<sup>210</sup> Moreover, the equality commission's assistance and enforcement work are often the first things that are reduced if the institution's budget is cut.<sup>211</sup> Budgetary problems were one reason the UKCRE wound back its assistance work in 2003 and introduced a targeted approach.<sup>212</sup> Again, this highlights the importance of taking a strategic approach. To work within budgetary realities, the equality commission has to adapt its assistance work around its available funds by taking a strategic approach and determining the most effective use of its resource dollars.

Fourth, not every complainant will want their complaint to be the one that is pursued to the highest court. In most instances, this will require a long-term commitment and delay in receiving a remedy.<sup>213</sup> The complainant will have to give evidence and may be subject to media attention. The complainant has many things to consider before agreeing to receive the equality commission's assistance. Presumably, some will decide that the financial support and the equality commission's backing outweigh other considerations.

The fifth shortcoming is if the complainant settles. Not only does settlement prevent a precedent, the equality commission does not benefit from the resources it expends, financial or otherwise. None of the equality commissions considered in this article will prevent a complainant from settling; they accept this risk. The ECNI's approach moderates the risk by requiring the settlement agreement to include something that benefits persons other than the complainant. In this way, the Commission can justify its expended resources.

The two preceding shortcomings highlight the tension between the equality commission's desire to secure a precedent or remedy that benefits other members of the community and the complainant's desire to resolve the complaint expeditiously and appropriately. The equality commission must manage that tension and act in

209 The UKDRC engaged in lobbying political parties and parliamentarians in England, Scotland and Wales. See generally Fletcher and O'Brien, above n 64, 538. See also the discussion of *Coleman v Attridge Law* [2007] ICR 654 in Robin Allen, above n 199, 15.

210 ECNI, *Annual Report 2002–2003* (2004) 20–1.

211 For examples, most of the USEEOC's budget is allocated to fixed operating costs and any extra funding it receives is used for 'discretionary' items, such as enforcement, which are wound back if the budget is cut: Igasaki and Miller, above n 60, II.

212 UKCRE, *2003 Annual Report*, above n 54, discussed above Part II(D)(1).

213 See, eg, *Ansett Transport Industries (Operations) Pty Ltd v Wardley* (1980) 142 CLR 237, where it took three years for the complaint to reach the High Court. In *New South Wales v Amery* (2006) 226 ALR 196, 11 years elapsed between the lodging of the complaint at the NSW Anti-Discrimination Board and the High Court hearing. *Victoria v Schou* (2004) 8 VR 120 involved two tribunal trials and a Supreme Court trial and it finally resolved almost six years after Ms Schou resigned her employment.

an ethical way that does not compromise the complainant or result in a conflict between the complainant's needs and the equality commission's interests. Therefore, in addition to developing criteria for which cases to assist, the equality commission should develop guidelines for resolving complaints. For example, it may be prudent for the equality commission's in-house lawyers to assist the complainant with the early stages of preparing and lodging their complaint and use external lawyers if ADR is unsuccessful so that the equality commission remains at arm's length from decisions about resolving the complaint. It would also be appropriate for the equality commission to make the complainant aware from the outset that it is interested in their case because of its strategic potential and it would prefer a systemic outcome, but ultimately the complainant bears the responsibility for how the complaint is resolved.

Finally, although enabling the equality commission to assist complaints would add a new dimension to enforcement in Australia, it does not move the law away from the individual complaints based system. The primary limitations of that system are that it is passive, retrospective and reactionary.<sup>214</sup> The law does not pre-empt discriminatory behaviour; rather, it offers a resolution after the fact. There is no obligation on employers or service providers to take anticipatory action to address policies or practices that could disadvantage certain groups; the law only requires the respondent to take action to remedy unlawful behaviour once a successful complaint is made. O'Conneide explains:

The individual enforcement model relies excessively on an approach that resembles sending a fire engine to fight a fire rather than preventing that fire in the first place. The existing formal legislative approach eliminates difference, not disadvantage.<sup>215</sup>

O'Conneide's description highlights the need for a model which prevents the 'fire' by getting to the source of the 'flame'. This suggests that preventing discrimination is insufficient on its own; the law should also positively promote equality. That is the conclusion Britain reached after an individual complaints-based system failed to address systemic racism in the London Metropolitan Police Force.<sup>216</sup> Therefore, although investing the equality commission with an assistance role is valuable for

214 On the limits of anti-discrimination law, see generally Margaret Thornton, 'Revisiting Race' in Human Rights and Equal Opportunity Commission Race Discrimination Commissioner, *Racial Discrimination Act 1975: A Review* (Australian Government Public Service, 1995) 81, 83–5; Colm O'Conneide, 'Beyond the Limits of Equal Treatment: The Use of Positive Duties in Equality Law' (Paper presented at Mainstreaming Equality: Models for a Statutory Duty, Equality Authority, Dublin, Ireland, 27 February 2003) 20–2; Sandra Fredman, 'Changing the Norm: Positive Duties in Equal Treatment Legislation' (2005) 12 *Maastricht Journal of European and Comparative Law* 369, 370–3.

215 O'Conneide, 'Beyond the Limits', above n 214, 21.

216 See William Macpherson, *The Stephen Lawrence Inquiry: Report of an Inquiry by Sir William Macpherson of Cluny*, Cm 4262-I (1999). As a result, Britain introduced a positive duty on public authorities to promote racial equality: RRA(UK) s 71, and, more recently, duties to promote equality on the grounds of gender and disability: SDA(UK) ss 76A, 76B, 76C; DDA(UK) ss 49A, 49D. A positive duty also operates in Northern Ireland: *Northern Ireland Act 1998* (UK) s 75. See also Fredman, 'Changing the Norm', above n 214; Colm O'Conneide, 'Positive Duties and Gender Equality' (2005) 8 *International Journal of Discrimination and the Law* 91.



the reasons proposed above, the limits of solely relying on a reactive and passive system to address discrimination must be acknowledged.

## **V CONCLUSION**

The premise of this article is that the Australian equality commissions should discontinue handling discrimination complaints so that they are free to advise and assist complainants without any expectation that they will act neutrally. The article examined one enforcement method used by equality commissions in other countries — assisting complainants with resolving their complaint. This was chosen for discussion because to date equality commissions in Australia have not engaged in this work and it could be incorporated into the existing legal structure. Examples from other countries show how much can be achieved, legally and remedially, if the equality commission has the freedom — and also the resources — to take a strategic approach to enforcing and developing the law. By assisting individual complainants, the equality commission can tackle other instances of discrimination, strengthen and develop the law and increase the law's 'ripple effect' on other instances of discrimination.



## Wielding the big stick: lessons for enforcing anti-discrimination law from the Fair Work Ombudsman

*Dominique Allen\**

*Anti-discrimination law is enforced by a person who has experienced discrimination by lodging a complaint at a statutory equal opportunity agency. The agency is responsible for receiving and resolving discrimination complaints and educating the community; it does not play a role in enforcing the law. The agency relies on ‘carrots’ to encourage voluntary compliance, but it does not wield any ‘sticks’. This is not the case in other areas of law, such as industrial relations, where the Fair Work Ombudsman is charged with enforcing the law — including the prohibition of discrimination in the workplace — and possesses the necessary powers to do so. British academics Hepple, Coussey and Choudhury developed an enforcement pyramid for equal opportunity. This article shows that the model used by the Fair Work Ombudsman reflects what Hepple, Coussey and Choudhury propose, while anti-discrimination law enforcement would be represented as a flat, rectangular structure. The article considers the Fair Work Ombudsman’s discrimination enforcement work to date and identifies some lessons that anti-discrimination law enforcement can learn from its experience.*

**Keywords:** discrimination, fair work, regulation, enforcement, systemic investigation

### Introduction

The process of resolving a discrimination complaint varies only minimally across Australia. A person who has experienced unlawful discrimination can lodge a complaint at the statutory equal opportunity (or anti-discrimination) agency in their jurisdiction or at the federal Australian Human Rights Commission (AHRC). If the complaint falls within the agency’s jurisdiction and has substance, the agency will

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attempt to resolve it using conciliation and, if this fails, the complainant can lodge the complaint in a civil tribunal or in the federal courts. The exception is Victoria, which introduced direct access to the tribunal in August 2011 (*Equal Opportunity Act 2010* (Vic) (EOA (Vic)), s 122).

The agency's primary task is to receive discrimination complaints, investigate them and help the parties to resolve the complaint by providing confidential conciliation services. All of the agencies (except the Northern Territory Anti-Discrimination Commission) have the power to compel people to provide information or produce documents during the investigation phase and to compel a party to attend conciliation (see further Rees, Rice and Allen 2014, 752–54), but have no other coercive powers.

Only three agencies can assist the parties, financially and otherwise, if the complaint proceeds to court. The AHRC is restricted to assisting the complainant with preparing court forms to commence proceedings in the federal courts (*Australian Human Rights Commission Act 1986* (Cth) (AHRC Act), s 46PT). The South Australian Equal Opportunity Commissioner can provide representation for the complainant or respondent to present their claim before the tribunal (*Equal Opportunity Act 1984* (SA), s 95C). The Western Australian Equal Opportunity Commission is required to provide the complainant with assistance in preparing their case if the Commissioner refers their complaint to the State Administrative Tribunal and it can contribute towards the cost of witness and other expenses (*Equal Opportunity Act 1984* (WA) (EOA (WA)), s 93(2)). The Commissioner can also arrange legal representation or funding for the complainant to appear in the Supreme Court (EOA (WA), s 93A(1)). The agencies cannot litigate a complaint on behalf of the complainant; they can only assist with the costs associated with litigation or assist with completing court documents. As discussed below, the equal opportunity agencies do not play a role in enforcing the law other than by encouraging voluntary compliance.

The first part of this article outlines the enforcement pyramid for equal opportunity developed by British academics Hepple, Coussey and Choudhury (2000) and applies it to the powers and functions of the equal opportunity agencies. It then applies it to the relatively new Fair Work Ombudsman (FWO). The FWO is empowered to ensure compliance with federal industrial relations laws, including the prohibition of discrimination in the workplace. This examination shows that this regulatory model largely accords with what Hepple, Coussey and Choudhury propose. The article concludes by considering the lessons that can be learnt by anti-discrimination law from the FWO's experience to date.

This article focuses on discrimination and does not consider sexual harassment, even though it is prohibited by the anti-discrimination statutes. This is because the *Fair*

*Work Act 2009* (Cth) (FWA) does not explicitly prohibit sexual harassment, so it is not one of the FWO's responsibilities. In addition, sexual harassment claims have not been as difficult to enforce as discrimination claims.

## **The enforcement pyramid and the equal opportunity agencies**

### ***An enforcement pyramid for equal opportunity***

Australian anti-discrimination law regulates the conduct of employers and service providers by restricting the behaviour they can engage in throughout the employment relationship and in the provision of goods and services. If an employer or service provider behaves unlawfully, only the affected individual can take legal action. The statutory equal opportunity agency is responsible for encouraging organisations to comply by providing them with advice and information about their legal responsibilities.

Regulatory theorist John Braithwaite argues that, in the context of regulating business, persuasion will be more effective in securing compliance when it is supported by punishment (2002, 13, 19). In the context of anti-discrimination law, Braithwaite's theory suggests that an employer or service provider is unlikely to discriminate if they will be subject to a hefty sanction for doing so. Braithwaite does not suggest that the individual should be responsible for imposing the sanction; a regulatory body should do so. It wields this sanction or 'stick' infrequently; it is the threat that it might do so that encourages voluntary compliance. Alter and Vargas write that if a respondent knows that they could lose at court, they will be more willing to adjust their policies and practices voluntarily. They agree that a 'credible threat ... can be a weapon in itself' (2000, 464–65).

To assist the regulator with determining when to punish and when to persuade, Ayres and Braithwaite developed an 'enforcement pyramid' with persuasion at its base. This progressively escalates to agency investigation, then to punitive sanctions at the pyramid's apex (1992, 20, fig 2.1). The structure is pyramid shaped because the proportion of space at each level of the pyramid represents the amount of time to be allocated to that level, so those at the apex (judicial enforcement and sanctions) are used infrequently while persuasion (advice, education and information) at the pyramid's base is used often (Ayres and Braithwaite 1992, 35). Recently, Braithwaite has written that the presumption, even with the more serious breaches, should always be to start at the base of the pyramid and use more punitive measures reluctantly once modest sanctions have failed (2011, 482). What makes persuasion effective at

securing compliance is the threat that the regulator can seek the imposition of hefty penalties if compliance is not forthcoming.

Drawing on this work, Hepple, Coussey and Choudhury developed a regulatory enforcement pyramid specific to equal opportunity. At the pyramid's base, Level One, the equal opportunity agency uses persuasion that includes providing information, training and monitoring compliance. At Level Two, the organisation can develop voluntary action plans in consultation with interest groups, including developing best-practice standards. At Level Three, the agency can investigate an organisation if it forms the belief that it is noncompliant by making inquiries and seeking undertakings. If this fails, at Level Four, it can issue a compliance notice which may include an action plan outlining how the organisation can address the noncompliance. The organisation can appeal the issue of the notice but, if it does not observe it, at Level Five, the agency can seek judicial enforcement. At the upper levels, the court can impose sanctions. Withdrawal of government contracts or licences sits on the pyramid's apex for contractors who are persistently noncompliant (Hepple, Coussey and Choudhury 2000, ch 3, particularly fig 3.1). This section of this article uses Hepple, Coussey and Choudhury's pyramid to analyse the regulatory powers of the equal opportunity agencies and considers them in order of severity.

### ***Providing information and education***

The equal opportunity agencies are responsible for educating the local community about their legal rights and obligations and providing information about the law (see, for example, AHRC Act, s 31(d); EOA (Vic), s 155(1)(a)). The agencies provide information through their websites and phone advice lines, holding training sessions and conducting advertising awareness campaigns, such as the AHRC's 'Racism. It Stops With Me' campaign. This is consistent with Level One of the enforcement pyramid.

All of the agencies, except the Australian Capital Territory agency, can intervene in litigation or appear in court as an *amicus curiae* (some can do both). Whether they are restricted to discrimination matters varies between jurisdictions. The purpose of this function is to assist the court by offering the agency's expertise and knowledge of the law. For this reason, it is situated on Level One of the pyramid.

### ***Guidelines, codes of practice and reviews***

One of the agency's functions is to prepare guidelines or codes of practice about how to comply with the law (for example, *Anti-Discrimination Act 1998* (Tas) (ADA (Tas)), s 6(f); EOA (Vic), s 148; AHRC Act, s 31(h)). Guidelines are not enforceable,

but in New South Wales the tribunal may consider evidence of compliance or contravention of a code of practice and in Victoria the tribunal may consider a practice guideline if it is relevant to a matter before it (*Anti-Discrimination Act 1977* (NSW) (ADA (NSW)), s 120A; EOA (Vic), s 149). To date, the Victorian tribunal has not considered a practice guideline. The Victorian Equal Opportunity and Human Rights Commission (VEOHRC) is the only agency that can review an organisation's practices and programs on request to determine whether they are compliant with the EOA (Vic). Neither the review nor any advice provided by the agency affects the person's liability or creates a defence (EOA (Vic), s 151). To date, the VEOHRC has not received any requests for a review.

These compliance mechanisms are essentially another form of information developed by the agency, but they are valuable because they encourage organisations to improve behaviour by providing examples of best practice and comprehensive information. Moreover, they anticipate how unlawful conduct may arise so that organisations can address problems proactively, rather than waiting for someone to experience discrimination and make a complaint. They are situated at Level One of the enforcement pyramid.

### **Action plans**

The AHRC can receive action plans developed by a person or an organisation that is prohibited from discriminating under Pt 2 of the *Disability Discrimination Act 1992* (Cth) (DDA) (s 64). The action plan must include provisions about devising policies and programs to achieve the DDA's objects and evaluating them; communicating these policies and programs to people within the organisation; reviewing practices to identify discriminatory practices; setting goals and targets to measure the success of the action plan; and appointing people within the organisation to implement the plan (DDA, s 61). Section 60 of the DDA states that a person 'may prepare and implement an action plan' (emphasis added); there is no requirement that they do so. Action plans do not have to be submitted to the AHRC but, if they are, the AHRC must make the action plan available publicly (DDA, s 64). To date, 695 action plans are available.<sup>1</sup> Action plans can be taken into account when a respondent relies on the defence of 'unjustifiable hardship' (DDA, s 11(1)(e)).

The EOA (Vic) permits the development of action plans, but the agency has a slightly different role from that of the AHRC. An organisation can create an action plan that outlines the steps that the organisation will take to improve compliance with the Act

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1 See <https://www.humanrights.gov.au/our-work/disability-rights/standards/action-plans/register-disability-discrimination-act-action> (accessed 20 June 2014).

in relation to any form of discrimination. The VEOHRC may provide advice about preparing and implementing the action plan. An organisation may submit the plan to the VEOHRC and, if it meets the agency's minimum requirements, it may register the plan and publish it. To date, the VEOHRC has not received any action plans. Action plans are not binding, but the tribunal may consider a plan if it is relevant to the matter before it (EOA (Vic), ss 152, 153).

In both instances preparing an action plan is voluntary, as required by Level Two of the enforcement pyramid — but there is no requirement to consult with affected stakeholders, which is inconsistent with the pyramid.

### **Disability standards**

The Commonwealth Attorney-General may formulate Standards for the employment, education, accommodation and provision of transportation and services for people with a disability, and in relation to the administration of Commonwealth laws and programs for people with a disability (DDA, s 31). Standards are designed to increase access for people with a disability systemically, rather than on a case-by-case basis, and to set timeframes for industries to ensure that they are complying with the DDA. To date, three Standards have been formulated: the Disability Standards for Accessible Public Transport 2002, the Disability Standards for Education 2005 and the Disability (Access to Premises — Buildings) Standards 2010. It is not unlawful discrimination to act in compliance with a Standard (DDA, s 34). However, a court has yet to determine whether a Standard can make lawful what was unlawful under the DDA (see further Rees, Rice and Allen 2014, 327–28).

For the purposes of this discussion, it is important to note that Disability Standards are not enforced any differently from a disability discrimination complaint (DDA, s 32). The Federal Court has confirmed that only 'a person aggrieved' can bring an action for the breach of a Disability Standard (*Access For All Alliance (Hervey Bay) Inc v Hervey Bay City Council*, 2007), which means that for a representative group to take action on behalf of its members, for example, it would have to show that it was 'aggrieved' (AHRC Act, s 46P(2)). The AHRC's role is limited to advising the Minister about developing Standards, monitoring the operation of the Standards and reporting to the Minister (DDA, s 67(1)(d), (e)). It does not have the power to enforce compliance with the Standards. Disability Standards are useful because they are worded more specifically than the DDA and they include a strategy and timeframe for increasing compliance. As a compliance mechanism, they do more than an action plan because noncompliance is unlawful and can give rise to a cause of action by an individual, but they do not sit comfortably on the pyramid because of how they are enforced. They operate in parallel to the DDA as a source of additional obligations.

## **Investigations**

The 'investigation' function referred to in most anti-discrimination statutes usually refers to the agency's function of conducting an investigation into a discrimination complaint lodged by an individual (some statutes use the term 'inquiry'). In some jurisdictions, the relevant Minister (for example, ADA (Tas), s 70(1); *Anti-Discrimination Act* (NT), s 74) or the tribunal (for example, *Anti-Discrimination Act 1991* (Qld) (ADA (Qld)), s 155(1)(b); EOA (Vic), s 128) can refer matters to the agency for investigation. At the conclusion of the investigation, the agency will attempt to conciliate the matter and refer it to the tribunal if that fails (for example, ADA (Qld), s 155). If the matter was referred to investigation by the Minister, the agency can also submit a report and recommendation to the Minister (for example, ADA (Tas), s 70(3)).

The EOA (Vic) is slightly different. 'Investigation' refers to a process used for more serious allegations of discrimination of which the VEOHRC becomes aware through its enquiry line, resolving discrimination claims, research or media reports (VEOHRC 2011, 1). The VEOHRC can investigate matters that raise a serious issue relating to a class or group of persons that cannot reasonably be expected to be resolved by a dispute resolution processes or through a tribunal application if there are reasonable grounds for suspecting that a contravention has occurred and the investigation would advance the Act's objects (EOA (Vic), s 127). After it conducts an investigation, the VEOHRC may take any action it thinks fit. This includes entering into an agreement with a person about any action required to comply with the Act that can be registered by the tribunal as an order, referring the matter to the tribunal for an inquiry, and preparing a report to the Minister or to Parliament about the matter, which may be laid before each House of Parliament (EOA (Vic), ss 139, 140, 141, 142). At the time of writing, the VEOHRC was conducting an investigation into accessible toilets at metropolitan train stations.

The AHRC Act uses the term 'inquiry' to refer to an investigation. The AHRC can inquire into human rights breaches by Commonwealth agencies on its own motion or if it receives a complaint. 'Human rights' is defined to include the rights and freedoms covered in relevant conventions that Australia has ratified (AHRC Act, s 3). The AHRC can also conduct an inquiry into workplace discrimination on the basis of attributes that are not covered by federal legislation. This power gives effect to Australia's obligations under the International Labour Organization's *Recommendation concerning Discrimination in Respect of Employment and Occupation* (1958). The AHRC can attempt to conciliate breaches of both types, but they cannot be referred to court (AHRC Act, ss 11(1)(f), 20, 31). If it cannot be resolved, the matter will be declined or the AHRC President may find a breach and prepare a report and recommendations to the Attorney-General. The report must be tabled in each House



of Parliament (AHRC Act, s 46). Since 1996, the AHRC has prepared 64 reports for the Attorney-General. Thirty were about immigration detention or the Department of Immigration and Citizenship.

Investigations are located at Level Three of the enforcement pyramid, but Hepple, Coussey and Choudhury's model requires that if the agency finds that an organisation is noncompliant, it can make further inquiries and seek enforceable undertakings. The equal opportunity agencies can make further inquiries during an investigation but, if they find noncompliance, they do not have the power to enter into enforceable undertakings or issue a compliance notice if this fails, as required by Level Four of the pyramid. Their only recourse is to issue a report to parliament.

### **Summary**

The shape that emerges from the examination of the agencies' enforcement functions is a flat, rectangular structure, rather than a pyramid. The powers of the agencies are concentrated at the lower levels of the enforcement pyramid and are concerned with voluntary compliance through education, providing information, issuing guidelines and conducting inquiries into significant human rights issues. If these measures fail, the agency can only use persuasion to achieve compliance and act as a neutral conciliator if a discrimination complaint is made. The agencies are regarded as administrative agencies, not enforcement bodies. Indeed, the VEOHRC is the only one of the agencies that is described as an advocate for anti-discrimination law (EOA (Vic), s 155(1)(b)).

This shows that the equal opportunity agencies do not possess the 'sticks' needed to enforce compliance with the law. It is likely that many organisations will comply voluntarily because they are good corporate citizens, because it makes good business sense or, for employers, to avoid being held vicariously liable for their employees' behaviour. However, others may choose not to comply because very few complaints proceed to court and financial compensation, whether agreed to at settlement or ordered by a court, is low (Allen 2009, 786–87; 2010, 97). Consequently, an organisation may weigh up the cost of noncompliance and find that it is minimal, considering that the agency lacks the power to enforce compliance and the law is difficult for an individual to enforce. These organisations may decide that it is too costly to change their practices and will wait until a complaint is made against them and either challenge it or settle it confidentially. Hepple, Coussey and Choudhury also acknowledge that this is a problem. They write that a voluntary approach will not influence those who are resistant to change for economic or social reasons (2000, 57).

For this reason, an enforcement model that is concentrated on voluntary compliance without the threat of sanctions is not desirable. This was acknowledged by the Bracks Labor government in Victoria, which introduced major changes to the agency's role in 2010 in accordance with the recommendations made following a review of the *Equal Opportunity Act 1995* (Vic) (Department of Justice (Victoria) 2008, recommendations 67–86) and submissions to the government's review, which supported a more proactive role for the agency (Department of Justice (Victoria) 2008, n 338). As discussed above, the VEOHRC can conduct an investigation into serious instances of discrimination, harassment or victimisation (EOA (Vic), s 129). As the EOA (Vic) was originally enacted, if it found discrimination, the VEOHRC had a range of escalating options available, starting with entering into a voluntary agreement with the noncompliant organisation. At the next level, the VEOHRC could accept enforceable undertakings that the organisation would comply with the law. As a last resort, the VEOHRC could issue a compliance notice, requiring the organisation to fix the problem (EOA (Vic), ss 139, 144–147 as originally enacted).

The VEOHRC's new powers were removed by the Baillieu government before the Act came into force (see *Equal Opportunity Amendment Act 2011* (Vic)). In his second reading speech, the Attorney-General, Robert Clark, described these powers as 'sweeping and unchecked' and 'inappropriate for a public body', claiming that 'support for and commitment to equality of opportunity is best built through education and dialogue' (Clark, 1364). Now at the conclusion of an investigation, the VEOHRC can only enter into an agreement with the organisation, refer the matter to the tribunal or make a report to the Attorney-General or Parliament (EOA (Vic), s 139).

Agency enforcement has not been reviewed in any other jurisdiction. The most recent inquiry into anti-discrimination laws under the Rudd–Gillard federal government did not consider the enforcement model because the inquiry's parameters were narrow and only concerned with consolidating the four federal Acts, and the government had committed not to increase the regulatory burden on business (McLelland and Tanner 2010).

In other areas, such as competition law and securities regulation, much stronger enforcement models operate. It could be argued that regulating the behaviour of corporations in the marketplace is quite different from regulating how a corporation behaves towards its employees or consumers of its goods and services, and so the Australian Securities and Investments Commission and the Australian Competition and Consumer Commission, for example, are not comparable to the AHRC. However, stronger enforcement models do operate in the employment sphere in relation to workplace health and safety laws, which are enforced by state-based agencies such as WorkSafe in Victoria, and in relation to federal employment standards, which are

enforced by the FWO. The next section of the article considers the FWO's functions, focusing on its enforcement powers. It was chosen because the FWO is empowered to enforce the prohibition of discrimination in s 351 of the FWA, so it is directly comparable to the equal opportunity agencies.

## The Fair Work Ombudsman

### ***Prohibiting discrimination in the Fair Work Act***

Section 351 of the FWA prohibits employers from taking adverse action against an employee or prospective employee because of their race, colour, sex, sexual preference, age, physical or mental disability, marital status, family or carer's responsibilities, pregnancy, religion, political opinion, national extraction or social origin. Section 342 defines adverse action as dismissing the employee, injuring the employee, altering the employee's position to their detriment, refusing to hire a prospective employee, or discriminating between employees or against a prospective employee. Threatening to take or organising adverse action is also included. The FWA contains a shifting onus of proof, so once an employee or prospective employee alleges that they were subject to adverse action and establishes that they possessed an attribute listed in s 351(1), it is presumed that the adverse action was taken because of the attribute unless the employer proves otherwise (s 361(1)). If it finds that s 351 has been breached, the Federal Court or Federal Circuit Court can order an injunction to remedy the contravention, the payment of compensation or that the employee is reinstated (FWA, s 545). Section 351 is a civil remedy provision, so the court can also order the payment of a pecuniary penalty of up to 60 penalty units per breach for individuals and five times that for body corporates (FWA, s 539). One penalty unit is \$170 (*Crimes Act 1914* (Cth), s 4AA). The court has a broad power to make any order it considers appropriate if it finds that a civil remedy provision has been breached (FWA, s 545(1)).

Unlike most other parts of the FWA, s 351 did not exist in previous iterations of federal industrial relations legislation except in regard to termination (see, for example, the *Workplace Relations Act 1996* (Cth), s 659), so the commencement of the Act on 1 July 2009 marked a significant development in the history of prohibiting discrimination in the workplace in Australia. Part 5-3 of the Act established a new statutory enforcement body, the FWO, with the power to enforce the Act, including s 351. These powers are considered in this section, along with an examination of how the FWO has used its powers to date in the context of enforcing s 351.

The process of enforcing s 351 differs from traditional anti-discrimination law in two ways. First, the individual employee who experiences discrimination is not solely responsible for enforcement; the FWO and a trade union can enforce s 351 (FWA, s 539). Second, the FWO does not play a dual role of receiving complaints and resolving them. The Fair Work Commission (FWC) and the federal courts resolve complaints, but the applicable process depends on whether the employee was dismissed. If the employee was dismissed, they must lodge the application at the FWC within 21 days after dismissal took effect (FWA, ss 365, 366, 371). The FWC will then convene a private conference to deal with the dispute through mediation, through conciliation, by making a recommendation or by expressing an opinion (FWA, ss 368, 592, 595(2)). Employees who were not dismissed can choose whether to proceed directly to court or ask the FWC to assist the parties to resolve the dispute, and it will do so if both parties agree (FWA, ss 372–374). Alternatively, the employee can take their complaint to the FWO. When the FWO receives a complaint, it will consider the nature of the alleged discrimination and whether it falls within its jurisdiction. It will then be assigned to a Fair Work Inspector for further investigation or referred to another body, such as the AHRC or the FWC, if appropriate (FWO 2012a, 9–10).

Section 682 of the FWA sets out the FWO's functions. The functions relevant to this discussion are to promote compliance with the Act, including by providing employers with information and best-practice guides to workplace relations; to monitor compliance; to inquire into and investigate any practice that may breach the Act; to commence court proceedings or lodge an application at the FWC to enforce the Act; and to represent employees who are a party to court proceedings or a matter before the FWC if the FWO considers that doing so will promote compliance with the Act. The FWO has said that it prefers to use voluntary compliance measures to resolve a contravention, but it will commence proceedings in order to address serious or repeated breaches or if the employer refuses to address the breach voluntarily (FWO 2013a, 35). The remainder of this section considers the FWO's powers and their usage to date as they align with the first six levels of Hepple, Coussey and Choudhury's enforcement pyramid. While the FWA does not prohibit voluntary action plans, they are not explicitly mentioned, so Level Two is not considered. As it is not possible for government contracts to be withdrawn if an employer contravenes the FWA, Level Seven is not considered.

### ***Level One — information and education***

The FWO publishes information for employers about their obligations under the FWA, including fact sheets and checklists, and it conducts campaigns directed at particular industries or defined attributes, such as its 2012–13 education program

targeting working parents in which it used the media to highlight the prevalence of pregnancy discrimination (FWO 2013a, 21). The FWO also maintains a phone line that provides employers and employees with general information not only about workplace discrimination, but also about the array of workplace issues covered by the FWA. The FWO produces best-practice guides to assist employers with meeting their obligations under the Act. These guides cover a range of issues that arise in the workplace. It is unclear whether they are developed in consultation with affected groups of employees and other stakeholders. These mechanisms are consistent with Level One of the enforcement pyramid.

### ***Level Three — investigations***

Fair Work Inspectors possess statutory information-gathering powers they can use when investigating an allegation of discrimination. A Fair Work Inspector may enter a workplace and obtain evidence by interviewing the employer, the employee and any witnesses, and they may require records or documents to be produced which they can inspect and copy (FWA, ss 708, 709, 712, 714). At the conclusion of the investigation, if the FWO reasonably believes that a person has breached s 351, the FWO can take action, as discussed below. Investigations are in keeping with Level Three of the enforcement pyramid in the sense that the FWO can take enforcement action if it forms the belief that an employer has contravened the FWA. In this way, the FWO differs quite starkly from the equal opportunity agencies.

### ***Level Four — compliance notices and enforceable undertakings***

#### *Compliance notices*

If the contravention relates to the National Employment Standards (found in Pt 2-2 of the FWA) or a term of an industrial agreement or certain orders made by the FWC, the FWO may issue a compliance notice requiring the addressee to rectify the contravention (FWA, s 716). Failure to comply with a compliance notice is a civil penalty provision (FWA, s 716(5)). Issuing a compliance notice is reviewable by the Federal Court on the basis that the employer has not contravened the FWA or the notice was not issued correctly (FWA, s 717). The FWO cannot issue a compliance notice if the employer has given an undertaking in relation to the contravention (FWA, s 716(4)).

The FWO has not issued a compliance notice in a discrimination claim to date. An example of when the FWO could do so is if the adverse action was discrimination in the form of paying the employee less than they were entitled to under a modern

award, enterprise agreement or equal remuneration order because of a protected attribute. The notice would be required to detail the nature of the contravention, give the employer a reasonable time to rectify the direct effects of contravention, such as back paying wages, and require the employer to provide evidence of this (FWO 2012d, 5). As the employer can only be required to address the direct effects of the contravention, this mechanism may not be as useful as an enforceable undertaking in a discrimination claim because the latter can and has been used to require the employer to address the wider, systemic effects of the contravention, such as reviewing its policies and conducting training to avoid future breaches. Nevertheless, this enforcement mechanism is consistent with Level Four of the enforcement pyramid in that it is used in the event of noncompliance and reviewable by a court.

### *Enforceable undertakings*

If an Inspector ‘reasonably believes’ that a person has contravened a civil remedy provision, which includes s 351, it may accept enforceable undertakings in writing from that person instead of commencing litigation. The FWO cannot accept enforceable undertakings if it has issued a compliance notice (FWA, s 715). The FWO says that the purpose of enforceable undertakings is ‘to focus the wrongdoer on the tasks to be carried out to remedy the alleged contravention, and/or prevent a similar contravention in the future’ (FWO 2012e, 5.1). It was the view of the former FWO, Nicholas Wilson, that enforceable undertakings are ‘a forward-thinking alternative to litigation and result in strong outcomes without civil court proceedings’ (FWO 2012b).

By June 2014, the FWO had entered into seven enforceable undertakings as a means of resolving contraventions of s 351, five in 2012 and one each in 2011 and 2013. Three were instances of pregnancy discrimination, one was age discrimination, two were disability discrimination and one was disability and pregnancy discrimination. The FWO issues a media release when undertakings are reached and the undertakings are available on its website.<sup>2</sup> Publicising enforceable undertakings potentially deters other employers from contravening the FWA by making them aware of the penalties that could be imposed if they do so. By contrast, the processes and outcomes of the equal opportunity agencies are privatised.

The FWO requires an enforceable undertaking to contain an admission by the employer that it has contravened the FWA, details of the contravention and a commitment to undertake certain actions to address the contravention within a

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2 See [www.fairwork.gov.au/About-us/Our-role/enforcing-the-legislation/enforceable-undertakings](http://www.fairwork.gov.au/About-us/Our-role/enforcing-the-legislation/enforceable-undertakings) (accessed 29 October 2015).

stated timeframe (FWO 2012e, 6.2). The FWO states that it will accept an enforceable undertaking if it offers 'a more effective regulatory outcome', which means that 'it produces an efficient result that compensates those persons who have suffered loss or damage as a result of the contravention or where it offers opportunities to ensure continuing compliance that may not be available via an order from a court' (FWO 2012e, 5.4). An examination of the actions contained in undertakings to date shows that they fall into these categories.

The actions common to all undertakings to date are a commitment from the employer to comply with workplace laws in the future, to compensate the affected employee or employees or to reimburse underpaid wages, and to attend (or require relevant managers to attend) workplace relations training. While compensation is relevant only to the employees who receive it, the other two actions have the potential to affect future employees by changing the employer's behaviour. The next most frequent actions, which were included in six of the agreements, were to publish notices about the contravention in the workplace, to publish a notice about the breach (either in a newspaper or on social media) and to apologise to the affected employees. The first two actions serve to educate the broader community about the need to comply and deter future offenders, while the third action relates to the individual employee and highlights the need for acknowledgment of the harm caused. Five employers agreed to send a letter to the affected employee containing the contents of the enforceable undertaking. Two other actions found in four undertakings are concerned with future compliance and potentially affect other employees. Four employers agreed to review their policies or audit past practices and four agreed to seek specialist industrial relations advice for their workplace. Finally, two employers made a donation to a legal service that provides advice to employees. The court can make any order it deems appropriate if a civil remedy provision is breached (FWA, s 545) so it could order any of these actions, but courts with a similar power under an anti-discrimination statute have generally not used them creatively (Allen 2010). On that basis, the FWO is wise to use enforceable undertakings to achieve these outcomes.

As a mechanism, enforceable undertakings used by the FWO are consistent with what is required at Level Four of the enforcement pyramid because they require action to be taken if the FWO reasonably believes that a contravention has occurred. If the employer does not comply, the enforcement action available to the FWO escalates, as required by Hepple, Coussey and Choudhury's model and as described below.

### ***Level Five — judicial enforcement***

If the employer contravenes an enforceable undertaking or fails to comply with a compliance notice, the FWO can take action to enforce compliance. The FWO may

also do so if it cannot reach an enforceable undertaking with the employer. The court can order the employer to comply, compensate a person for any loss suffered as a result of the noncompliance, or make any other order it deems appropriate (FWA, s 715(7)). It can also impose a civil penalty, as discussed below. This is consistent with Level Five of the enforcement pyramid, which requires that if the Level Four mechanism is breached, the agency can seek a court order requiring the respondent to take action within a specified time.

The FWO will commence litigation unless it is not in the public interest to do so. The factors it weighs up when deciding this are the nature and circumstances of the alleged contravention; the characteristics of the alleged wrongdoer, which includes whether they cooperated with the FWO in its investigation, their attitude towards workplace laws and their level of contrition; the impact of the contravention; the effect of litigation, including the likely outcome; the characteristics of the alleged aggrieved person; the level of public concern; the impact of proceedings on deterrence; and administrative considerations, such as the cost of litigation (FWO 2013c, 10–15). The FWO also considers whether judicial clarification of the law is required (FWO 2013a, 35). The FWO issues a media release when it successfully litigates a breach of the FWA. The media release outlines the facts, the remedy ordered and any penalty imposed (see, for example, FWO 2013d). The cases it has litigated and the penalties ordered in discrimination matters are discussed in the next section (more generally, see Hardy, Howe and Cooney 2013).

### **Level Six — sanction**

Section 351 is a civil penalty provision. As well as ordering the payment of a penalty, the court can make any order it considers appropriate if it is breached (FWA, s 545(1)). The FWO can seek the imposition of civil penalties of up to \$10,200 per breach for individuals and \$51,000 for body corporates (FWA, s 539). By June 2014, the FWO had litigated eight contraventions of s 351 since the Act commenced in July 2009. One was about age discrimination, two were about disability discrimination and the remaining five were about pregnancy discrimination (three of those cases were also about discrimination on the basis of family and carer responsibilities). Discrimination matters account for a small proportion of the FWO's litigation work each year. During the 2012–13 financial year, it commenced proceedings in three discrimination matters out of 50. By contrast, it commenced proceedings in 40 matters relating to wages and conditions (FWO 2013a, 36).

The compensation and penalties ordered in each case to date and any other remedies ordered are shown in table 1.



**Table 1: Fair Work Ombudsman compensation and penalties**

Case	Compensation	Civil penalty	Other
<i>Fair Work Ombudsman v Drivecam Pty Ltd</i> , 2011	\$1,320	\$3,600	Written apology
<i>Fair Work Ombudsman v Wongtas Pty Ltd (No 2)</i> , 2012	\$2,207.42	\$3,564	—
<i>Fair Work Ombudsman v Tiger Telco Pty Ltd (in liq)</i> , 2012	—	\$5,940	—
<i>Fair Work Ombudsman v WKO Pty Ltd</i> , 2012	\$5,000	\$13,200	—
<i>Fair Work Ombudsman v A Dalley Holdings Pty Ltd</i> , 2013	\$5,000*	\$30,888*	—
<i>Fair Work Ombudsman v Rocky Holdings Pty Ltd</i> , 2013	—	\$3,300	—
<i>Fair Work Ombudsman v Felix Corporation</i> <sup>#</sup>	—	\$53,592	—
<i>Fair Work Ombudsman v Theravanish Investments Pty Ltd</i> , 2014	\$10,000	\$29,150	—

\* Compensation and civil penalties were ordered after the respondent was found to have contravened the FWA in nine instances, only three of which were discrimination. It is not possible to state what amount was awarded for the discriminatory conduct only.

# The judgment had not been handed down at the time of writing (see FWO 2013d).

The court ordered the respondent to pay a civil penalty in each case. The average penalty was \$16,049, while the median was \$5940. In *Fair Work Ombudsman v Tiger Telco Pty Ltd (in liq)*, the penalty was paid to the employee directly pursuant to s 546(3)(c). In five cases, the employee was also awarded compensation for economic and non-economic loss. In their study of civil penalties imposed by the FWO and its predecessors between 2007–08 and 2011–12, Hardy, Howe and Cooney found that the average civil penalty imposed on corporate employers each financial year was in excess of \$30,000 (2013, 593). Two of the penalties imposed in the discrimination cases are comparable to or exceed this amount but, on average, they are much lower.

Discrimination was established in each case, but the parties filed an agreed statement of facts (in the seven cases for which the judgment is available), so the main issue for the court was to determine the appropriate penalty (see, for example, *Fair Work Ombudsman v A Dalley Holdings Pty Ltd* at [19]). The factors the court has taken into account in determining the penalty are:

- whether there was any evidence that the employer contravened workplace

- laws in the past and was likely to again (see, for example, *Fair Work Ombudsman v Rocky Holdings Pty Ltd* at [57]);
- whether senior management was involved in the contravention (*Fair Work Ombudsman v WKO Pty Ltd* at [66]; *Fair Work Ombudsman v Wongtas Pty Ltd (No 2)* at [51]);
  - the nature and extent of the discriminatory conduct and whether it was deliberate — for example, in *Fair Work Ombudsman v Drivecam Pty Ltd*, Emmett FM found that there was no intention to discriminate or exploit the employee's disability and the behaviour itself (paying a hair stylist with a disability an hourly rate below the award rate) was considered to be at the 'very low end of discriminatory conduct' (at [75]);
  - the need to promote compliance with the FWA (see, for example, *Fair Work Ombudsman v A Dalley Holdings Pty Ltd* at [19]) and to deter others from contravening the Act (see, for example, *Fair Work Ombudsman v Rocky Holdings Pty Ltd* at [78]–[83]);
  - the size of the employer's business — for example, in *Fair Work Ombudsman v Rocky Holdings Pty Ltd*, Emmett J noted that the respondents operated a profitable medical practice and had the financial resources to obtain legal advice about the correct rate of pay for the employee in question but had failed to do so (at [62]–[63]); and
  - whether the employer assisted the Inspector with their investigations — for example, Bromberg J noted in *Fair Work Ombudsman v A Dalley Holdings Pty Ltd* that the respondent's preparedness to agree to a statement of facts and make admissions meant that there was no need for a protracted hearing (at [19]; see also *Fair Work Ombudsman v Tiger Telco Pty Ltd (in liq)* at [30]) and, by contrast, in *Fair Work Ombudsman v Wongtas Pty Ltd (No 2)*, Cowdroy J took into account that the respondent initially challenged the FWO's power to bring the action and it did not take any corrective action in response to the FWO's inquiries, rather it terminated the employee, and the evidence was not conclusive as to whether the respondents cooperated with the FWO in its investigations (at [53]–[56]).

The use of these factors suggests that the penalties are being imposed in a responsive way. The same penalty has not been applied to all respondents; rather, the penalties have been applied in response to the different behaviour of the organisations that have been found to be at fault.

## Lessons for anti-discrimination law enforcement

The examination of the enforcement powers that the FWO possesses and how it has used them highlights the value in having a separate statutory agency charged

with enforcing workplace discrimination laws. The FWO focuses on encouraging voluntary compliance, but it has used its escalating powers to pursue employers for discriminating and has sought outcomes (through enforceable undertakings and litigation) that benefit the affected employee and other employees in the workplace. With similar powers, the equal opportunity agencies could act in the same way and the threat of a sanction would, as Braithwaite suggests, strengthen the likelihood that employers and service providers would comply voluntarily.

At present, the motivation for complying voluntarily — the fear that an employer or service provider may be punished for failing to comply — is missing because it is unlikely that an individual will bring a discrimination claim and the financial penalties for discriminating are low (Allen 2009; 2010). A related problem is that if the court determines that the respondent did not intentionally breach the law or that the breach is minor in nature and it decides to reduce the penalty, the only way the court can do this is by reducing the complainant's compensation award (see also Smith 2006, 714–15). By contrast, under the FWA, in such circumstances the compensation award would not be affected, the court would simply adjust the civil penalty imposed (see, for example, *Fair Work Ombudsman v Drivecam Pty Ltd*). Moreover, the maximum penalty available to the court of \$51,000 is not only quite hefty, it is also much higher than the average compensation award in a discrimination complaint. For example, between April 2000 and October 2011, the median amount of compensation awarded in successful claims brought under the *Racial Discrimination Act 1975* (Cth) was \$9750 (AHRC 2011; see also Allen 2010, table 1) and the median amount of compensation awarded by the Victorian Civil and Administration Tribunal between 2006 and 2008 was \$19,842.50 (Allen 2010, fig 1), while in New South Wales and Western Australia, compensation awards are capped at \$100,000 and \$40,000 respectively (ADA (NSW), s 108; EOA (WA), s 127). Sanctions available under the FWA are much higher.

There are, however, aspects of the FWO's approach that would need to be modified if this approach were to be transferred into anti-discrimination law. First, the 'stick' of enforcement does not need to be wielded frequently to be effective; it is the threat that it could be that makes organisations comply. It would not be necessary (nor would it be practical) for an equal opportunity agency to take enforcement action against every noncompliant organisation, but the threat that it could must be real to be effective and so the threat must be credible. While it is likely that the FWO will take action to enforce workplace laws (Hardy, Howe and Cooney 2013), it is not clear that discrimination claims are one of the laws that it will regularly enforce. Discrimination cases represent a small percentage of the FWO's enforcement work to date. It has litigated eight discrimination cases since July 2009. Three of those cases were in 2012 when, by contrast, it litigated 28 cases about underpayment of wages — which is by far the most common breach it has litigated to date. Similarly,

discrimination claims account for only seven of the 41 enforceable undertakings it has reached. Underpayment of wages is the most common contravention to be remedied in this way. Of course, discrimination is only one of 16 general protections in the FWA and the general protections are only one of the FWO's responsibilities, whereas the equal opportunity agencies would only be responsible for discrimination and sexual harassment claims. However, there is a danger that if an equal opportunity agency focused its enforcement work on a particular type of discrimination or a particular respondent or industry and neglected others, this would increase the likelihood that those who were not under its gaze would discriminate. Therefore, while it may choose to highlight topical forms of discrimination, as the next point further explains, the equal opportunity agency should do so strategically so that the action it takes against one respondent has a ripple effect and encourages others to comply.

Second, although the FWO says that one of the reasons it will litigate is if judicial clarification of the law is required (FWO 2013a, 35), there is no evidence of this to date. In the seven cases in which the judgment is available, the parties filed an agreed statement of facts, so there was no dispute over what had occurred and the court did not need to spend time ascertaining whether the employer had breached s 351 (see, for example, *Fair Work Ombudsman v Wongtas Pty Ltd (No 2)*; *Fair Work Ombudsman v Tiger Telco Pty Ltd (in liq)*). There is a need, however, for judicial clarification of what 'discrimination' in the FWA means, as Gaze and Chapman (2013, 367–69) and Rees, Rice and Allen (2014, 861–69) have identified. Likewise, there are aspects of anti-discrimination law that have not been considered by a superior court and the existing body of law largely favours respondents (Gaze 2002; Smith 2008; Thornton 2009). Thus, there is ample scope for an equal opportunity agency to use its enforcement powers not only to achieve voluntary compliance but also to develop the jurisprudence. Therefore, it is suggested that a suitable model for enforcing anti-discrimination law would be to use the escalating enforcement powers to target the most recalcitrant offenders who were not willing to comply and, in parallel to this, use litigation to test aspects of anti-discrimination law that require clarification from superior courts.

A final point to note is the resources needed for work of this nature. Litigation is costly and resources are finite. No doubt this is one reason why the FWO is selective in the matters it takes on and why it attempts to secure compliance through enforceable undertakings first (see also Hardy, Howe and Cooney 2013). This also suggests that an equal opportunity agency would need to be strategic in choosing which cases to litigate and select cases that will have the most impact and encourage others to comply for fear of the big stick being wielded against them.

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## Conclusion

The primary role of statutory equal opportunity agencies is to receive and resolve discrimination complaints. As this article has shown, the agencies lack the regulatory mechanisms needed to secure compliance with the law. Conceptualising the agency as an educator and facilitator places the entire burden of addressing discrimination on the individual who experienced the unlawful behaviour. This is not the case in industrial relations, where the FWO is charged with enforcing the law in keeping with what Hepple, Coussey and Choudhury propose for the enforcement of anti-discrimination laws. The FWO's work enforcing the discrimination prohibition in the FWA offers an alternative model that could be incorporated into anti-discrimination law and increase the law's effectiveness by introducing a regulator that can wield a big stick if compliance is not forthcoming voluntarily. ●

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